91-1376

Supreme Court, U.S.
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No. 91-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY INTERNATIONAL, *et al.*,

Petitioners,

—v.—

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding, contrary to the view of nine other circuit courts, that the asserted availability of post-judgment review is a sufficient ground to deny a petition for mandamus to review a district court's denial of a motion for recusal for the appearance of partiality, brought pursuant to 28 U.S.C. § 455(a)?

2. Whether the court of appeals' standard of review -- that even when "reasonable minds might draw different inferences from the facts" as to whether a district court's "impartiality might reasonably be questioned", a district court order denying recusal will not be overturned unless it is "clearly erroneous" -- is contrary to the law as established by this Court and the other courts of appeals?

3. Whether recusal of the district court judge was required under 28 U.S.C. § 455(a) in four cases involving Churches of the Scientology religion, where, *inter alia*, a *framed* copy of a recent *Time* magazine cover attacking the Scientology religion as a "cult of greed" hangs on the wall of the judge's chambers; where the *Time* cover article is an unrelenting, one-sided and scurrilous attack on Scientology and took an advocacy position against the Churches on issues central to the pending cases; and where the district judge and the special master had questioned the integrity of a court reporting service merely because the owner of the service, but not the court reporters, is a member of the Scientology religion?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.1 LIST

Petitioners in this Court and in the court of appeals are Church of Scientology International; Church of Scientology of California; Religious Technology Center; and Church of Spiritual Technology.

The United States District Court for the Central District of California is a Respondent in this Court and was the respondent below.

Vicki J. Aznaran; Richard N. Aznaran; United States of America; Sandra Baker; Baldemar Gomez; Charles Jeglikowski; Sherrill Fields; David Mayo; Advanced Ability Center; Robin Scott; Adrienne Scott; Ron Lawley; Morag Bellmaine; Steven Bisbey; Advanced Ability Center Candacraig; Advanced Ability Center East Grinstead; Church of the New Civilization; Harvey Haber; John Nelson; Jon Zegel; Vivian Zegel; Dede Reisdorf; and Richard Ofshe are respondents in this Court and were real parties in interest in the court below.

Petitioners have no parent companies, subsidiaries or affiliates to list pursuant to S.Ct. Rule 29.1.

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The Church of Scientology International ("CSI"), the Church of Spiritual Technology ("CST"), the Religious Technology Center ("RTC"), and the Church of Scientology of California ("CSC") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the court of appeals denying the Church's petition for a writ of mandamus (2a-3a) is unreported. The denial of the petition for rehearing and suggestion for rehearing en banc (1a) is unreported. The November 22, 1991, order of the district court denying the motions to recuse (4a) is unreported.[1/]

JURISDICTION

The order of the court of appeals was filed on December 4, 1991 (2a). The denial of the petition for rehearing was filed on January 30, 1992 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l); *see Schlagenhauf* v. *Holder*, 379 U.S. 104, 109 (1964).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455(a) provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

28 U.S.C. § 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

1/ The district court issued an oral decision at the hearing on the motions to recuse on October 25, 1991. The excerpts of the transcript of that hearing which contain the court's rulings are set forth at 5a-17a.

STATEMENT OF THE CASE

1. The Underlying Recusal Motions

Each petitioner is a Church of the Scientology religion. RTC is the entity charged with safeguarding the trademarks of the Scientology religion and with assuring that its religious services are provided in precisely the manner intended by its Founder, L. Ron Hubbard. CST is the archivist of the writings of Mr. Hubbard. CSI is the Mother Church of the Scientology religious hierarchy, and CSC is Scientology's former Mother Church.

These churches are litigants in one or more of four cases in the United States District Court for the Central District of California which have been assigned to the Honorable James M. Ideman. *See Vicki J. Aznaran, et al.* v. *Church of Scientology of California, et al.*, No. CV 88-1786 (JMI) (hereinafter "*Aznaran*"); *Religious Technology Center, et al.* v. *Scott, et al.*, No. CV 85-711 (JMI), and *Religious Technology Center, et al.* v. *Wollersheim, et al.*, No. CV-85-7197 (JMI) -- two separate actions that have been consolidated for all purposes (hereinafter "*Scott*"); and *Church of Scientology of California* v. *United States of America, Sandra Baker, et al.*, No. CV 90-2042 (JMI) ("*Baker*"). In September 1989, Judge Ideman appointed the Honorable James G. Kolts, a retired California Superior Court Judge, as Special Master in *Scott* to handle pretrial matters.[2/]

[2/] District court jurisdiction in *Aznaran* is premised upon diversity jurisdiction, 28 U.S.C. § 1332, in that plaintiffs are citizens of Texas and defendants are deemed citizens of California. *In Scott*, jurisdiction is premised on federal question jurisdiction, 28 U.S.C. § 1331, a federal copyright claim, 17 U.S.C. §§ 501, *et seq.*, and the doctrine of pendent jurisdiction. In *Baker*, jurisdiction is premised upon 28 U.S.C. § 1331, and because the United States of America is a party defendant, upon 28 U.S.C. § 1346. *See* Sup.Ct. Rule 14.1(i).

In each of these cases, sensitive issues concerning the Scientology religion are raised. In *Aznaran*, the plaintiffs rest their multi-million dollar claim for "intentional infliction of emotional distress" arising out of their voluntary participation in Scientology on the theory that Scientology is not a religion and therefore is not entitled to the protection of the religion clauses of the First Amendment. Indeed, there is currently pending before Judge Ideman the Churches' dispositive summary judgment motion seeking dismissal of the action pursuant to the First Amendment. The motion also seeks partial summary judgment that Scientology is a religion within the meaning of the First Amendment. In *Scott*, one of the defendants raised the spurious claim that he, rather than L. Ron Hubbard, authored some of Scientology's sacred scriptures. In *Baker*, CSC asserts claims arising from violations of its First Amendment rights as a religious entity.

Petitioners moved to disqualify Judge Ideman in these four cases, and to disqualify Special Master Kolts in *Scott,* on the following grounds, which, petitioners contended, give rise to an appearance of partiality pursuant to 28 U.S.C. § 455(a):

1) A framed cover of the May 6, 1991, edition of *Time* magazine, which characterizes the Scientology faith as a "Cult of Greed", hangs on the wall of Judge Ideman's chambers area;

2) Judge Ideman and the Special Master in *Scott* questioned the integrity of a court reporting service and the veracity of two transcripts solely because the owners of the service (but not the relevant reporters) are members of the Scientology religion;

3) Judge Ideman has had a personal and professional relationship with one of the key defendants in *Baker*;

4) Judge Ideman falsely accused the Church and its counsel of blatant disregard of his orders in *Aznaran*.

a. The *Time* Magazine Cover

On October 5, 1991, petitioners learned from a law student, who had been invited into Judge Ideman's chambers area by court personnel, that a *framed* copy of the cover of the May 6, 1991, issue of *Time* magazine hangs on the wall of Judge Ideman's and his staff's workspace.[3/] That cover portrays a tentacled volcano from which explodes the headline *"Scientology: The Cult of Greed."* Emblazoned on the volcano is the subtitle, "How the Growing Dianetics Empire Squeezes Millions from Believers Worldwide."[4/] The *Time* magazine cover is an offensive parody of the cover of L. Ron Hubbard's *Dianetics: Modern Science of Mental Health*, Scientology's first and best-known scripture. *Dianetics* covers, since the late 1960's, have featured an exploding volcano.

The eight page cover article contained in that issue of *Time* was written by an author who previously had published scurrilous attacks upon Scientology, and who, as set forth in the Churches' pleadings and exhibits in the district court, has acted in concert with groups and individuals who advocate and engage in the process of "deprogramming" adults into abandoning their religious or other associations with groups as

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[3/] During an employment interview with Bowles & Moxon, counsel of record for certain petitioners in each of the four cases, the law student explained that in the course of her current law clerk position with the City Attorney of Los Angeles, she delivered a brief to Judge Ideman's law clerk in September 1991, at which time she had been invited to step back into the staff area of Judge Ideman's chambers. There, she saw a framed copy of the May 6, 1991, cover of *Time* magazine hanging on the wall.

[4/] The cover was submitted as an exhibit to the recusal motions in the district court. It is reproduced in color as an appendix annexed to this petition.

diverse as the Pentecostal, Catholic and Scientology religions.[5/] The *Time* article is a relentless one-sided attack upon the Scientology religion, its leadership, its parishioners, and its lawyers. It is inflammatory in tone, accusatory in style, and dependent exclusively upon sources hostile to Scientology. It has been characterized by spokesmen for the National Council of Churches and the American Conference on Religious Movements as a "hatchet job" and a "new low" for American journalism, as set forth in the record below. Even putting aside the issue of the falsehoods and omissions in the article, no objective person could view the cover and the accompanying article as anything other than an extraordinarily critical attack on Scientology.

Perhaps the most disturbing aspect of the fact that the *Time* magazine cover hangs in Judge Ideman's chambers is that the article explicitly advocates in support of the positions taken by the Aznarans in their lawsuit pending before Judge Ideman.[6/] It favorably and uncritically quotes lurid unsub-

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[5/] "Deprogramming" is a term for acts which often involve forcibly seizing and holding an individual against his will and subjecting him to hours or days of indoctrination. For a description of "deprogramming", see *Colombrito v. Kelly*, 764 F.2d 122 (2d Cir. 1985), holding that such conduct is actionable under 42 U.S.C. § 1985(3).

[6/] It should be noted that in the *Aznaran* case, the plaintiffs actually submitted the *Time* cover to the district court in opposition to the Churches' motion for summary judgment. In reply, the Churches objected to the admissibility of such rank, false hearsay, but also submitted extensive rebuttals of *Time's* attack in an effort to prevent the court from being prejudiced by the article. To petitioners' knowledge, none of the Churches' materials were framed and hung on the walls of Judge Ideman's chambers.

stantiated accusations by both Aznarans,[7] but fails to mention their multi-million dollar lawsuit. And it repeatedly suggests -- despite the holdings to the contrary of numerous courts[8] -- that Scientology is not a *bona fide* religion, and is not entitled to the protection of the religion clauses of the First Amendment.[9]

Finally, it bears some emphasis that the framed cover was hung in a place not restricted solely to court personnel.

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[7] Ms. Aznaran is quoted as follows: "This is a criminal organization, day in and day out. It makes Jim and Tammy [Bakker] look like kindergarten." *Time* at 51; *see also id.* at 57. The article fails to mention Ms. Aznaran's concession in her own deposition that one of the reasons she was removed from her position as President of defendant RTC was for her support for individuals who had been removed from positions of authority for their involvement in wrongful secular conduct.

[8] In *Hernandez v. Commissioner,* 490 U.S. 680, 684-85(1989), this Court described Scientology beliefs and practices in clearly religious terms. The cases recognizing and holding that Scientology is a religion are numerous, including *Founding Church of Scientology* v. *United States,* 409 F.2d 1146 (D.C. Cir.), *cert. denied,* 396 U.S. 963 (1969); *Church of Scientology of California* v. *C.I.R.,* 823 F.2d 1310 (9th Cir. 1987), *cert. denied,* 486 U.S. 1015 (1988); *Christofferson* v. *Church of Scientology of Portland,* 57 Or.App. 203, 644 P.2d 577 (1982), *cert. denied,* 459 U.S. 1206 (1983); *Church of Scientology Flag Services Org.* v. *City of Clearwater,* 756 F.Supp. 1498 (M.D. Fla. 1991); *Barr* v. *Weise,* 412 F.2d 338 (2d Cir. 1969).

[9] Thus, *Time* asserts, *inter alia*, "The big business of Scientology has shielded itself exquisitely behind the First Amendment." The article suggests that when the Food and Drug Administration unsuccessfully attempted to prohibit Scientology from distributing its literature and religious artifacts in the late 1960's, "Hubbard responded by going fully religious, seeking First Amendment protection for Scientology's strange rites." *Id.* at 51. The article omits that the court of appeals held that Scientology indeed was a religion *at the time* of the FDA's actions. *See Founding Church, supra,* 409 F.2d at 1160.

The framing and hanging in the judge's chambers of a magazine cover attacking a party involved in no less than four cases before that judge necessarily requires a certain degree of conscious intention. By doing so in a quasi-public place, Judge Ideman invited the public reasonably to conclude he had formed certain judgments concerning that party. It is not surprising that the Churches have perceived the public display of the *Time* article as the equivalent of a display of Klan literature by a judge sitting in a case alleging racial discrimination.

b. The Attack on the Integrity of the Court Reporting Service

In the *Scott* cases, petitioners RTC, CSI, and CSC are plaintiffs, in which they seek relief against multiple defendants for the theft of confidential religious scriptures. Those three Churches and CST are also counterdefendants. The *Scott* cases, after nearly five years of litigation, were transferred from the Honorable Mariana R. Pfaelzer to Judge Ideman in 1989, who then appointed Judge Kolts as Special Master in September 1989.

On August 21, 1991, Jerold Fagelbaum, counsel for some of the *Scott* defendants, wrote to Sheila Atkinson-Baker, the owner of Atkinson-Baker & Associates, Inc., a certified shorthand reporting firm, alleging delays in his receipt of two transcripts and expressing "displeasure" at Atkinson-Baker's "performance" in the case.[10/] Fagelbaum's letter, which was sent to Judge Ideman, included an *ad hominem* attack upon Ms. Atkinson-Baker, based upon her religious affiliation. Noting that both Ms. Atkinson-Baker and her husband are Scientologists and that he believed they had made financial contributions to their religion, Fagelbaum made the false and wholly unsubstantiated accusation that "serious doubt" had

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[10/] The uncontroverted evidence in the record below shows that the delays were minor and inadvertent.

been raised about the veracity of the verifications signed at the end of each of the two transcripts (despite the fact that neither reporter is a Scientologist) and that Ms. Atkinson-Baker's "objectivity and independence have been thoroughly overshadowed." Fagelbaum further asserted, "Not only are you Scientologists *which, by itself, eliminates your independence in this case*, but also, you have a financial interest in the prosecution of this litigation itself." (Emphasis added).

At a September 19, 1991, hearing on an unrelated matter in *Scott,* Special Master Kolts told the parties that Judge Ideman had called him after receiving Fagelbaum's letter, that "this is the only time he's called me in these entire proceedings," Sept. 19, 1991, Reporter's Transcript, at 4, that Judge Ideman "was obviously upset", *id.,* and that he "was concerned about the allegations," *id.* at 64. According to Judge Kolts, Judge Ideman stated that the matter "should require some looking into." *Id.* at 6. The Special Master stated that he had reassured Judge Ideman that the only problem with the transcripts had related to delay, and that it had been resolved because matters had proceeded in any event. *Id.* The Special Master refused counsel's request to be more specific as to the concerns raised by Judge Ideman. *Id.* at 6, 64-65.

Notwithstanding his statement that delay was the only problem, the Special Master then admonished the Church's counsel, stating "that it was an extremely unwise choice of action to permit it to go on, because *I think the transcript of any proceedings that these people reported* is certainly open to some question." *Id.* at 4-5 (emphasis added). Thus, in response to Judge Ideman's prompting, and without a shred of evidence in support, the Special Master adopted Mr. Fagelbaum's position that the accuracy of any transcript reported by a non-Scientologist who is employed by a company owned by members of the Scientology religion could not be trusted. The Special Master also told the Church's counsel,

"I advised you that I felt that . . . [use of the Atkinson-Baker service] would always leave the potential . . . for someone to claim that there was something wrong with that transcript." *Id.* at 65. When one of the Church's attorneys questioned "why the contents of the transcript would be at all suspect simply by virtue of the fact that a Scientologist is involved in the company," *id.* at 5, the Special Master responded that "it was an unfortunate situation that need not have occurred." *Id.* at 6. When the attorney pointed out that Atkinson-Baker hires its reporters without regard to their religion, the Special Master responded that the practice of using reporters hired by Atkinson-Baker "was an ill-advised way to go." *Id.* at 65.

c. Judge Ideman's Relationship With One of the Defendants in the *Baker* Case

In the *Baker* case, defendants include agents and representatives of the Internal Revenue Service and the United States of America. One of these defendants, IRS attorney Charles Jeglikowski, acknowledged in deposition that he had a personal and professional relationship with Judge Ideman. Mr. Jeglikowski testified that from approximately 1973 to 1976, both he and Judge Ideman were posted in the 78th Military Law Center in San Pedro, California in the same or sister units of the Judge Advocate General Corps in the U.S. Army, during which they enjoyed a "cordial" relationship. The Jeglikowskis and the Idemans also attended "one or two" social functions together.

In the *Baker* case, which will be tried without a jury, Judge Ideman will be required to adjudicate whether or not his friend and former colleague has been culpable of serious alleged misconduct and is liable for damages. Mr. Jeglikowski chairs the monthly IRS meetings held in Pasadena for the planning and execution of actions for which CSC seeks redress on the ground that they are unlawful and unconstitutional. Judge Ideman will also be required to make determi-

nations as to the credibility of the testimony of Mr. Jeglikowski and the subjective intent of Mr. Jeglikowski concerning conduct which is susceptible to differing interpretations by the finder of fact. For example, violation of CSC's First Amendment rights arising out of the religious animus of Mr. Jeglikowski, among others, is at issue.

d. Judge Ideman Falsely Accused Petitioners and Their Counsel of Blatant Disregard of his Orders in the *Aznaran* Case.

On August 30, 1991, after petitioners had protested the chronic violations of court orders, the local rules, and other procedural obligations by the Aznarans' counsel,[11/] Judge Ideman entered an order, which states in pertinent part:

> The court has not been favorably impressed with either counsel's lack of compliance with either its orders or the local rules throughout the pendency of this action. Because *both* parties' counsel have felt free to repeatedly act *in blatant disregard of this Court's Orders* and more importantly, in light of the fact that this Court seeks to reach an adjudication on the merits of all remaining pending motions, rather than becoming mired in adjudicating which side in this litigation is more often in violation of the rules of this Court, the Court ACCEPTS all submissions to date. . . . .
>
> In light of the flagrant misconduct of both sides in this action, all pending requests for sanctions are hereby DENIED. Counsel is [sic] put on notice however that should they continue to engage in

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11/ The chronology of events pertaining to the Aznarans' disregard of the orders of the court and the local rules appears in the Petition for Writ of Mandamus, at 16-22.

> outrageous litigation tactics, the Court will not hesitate to use its sanctioning power.

(Emphasis added). The events leading up to that order, however, demonstrate that the Aznarans and their counsel *alone* engaged in "blatant disregard" for the rules and orders of the court, a fact that the district court judge to whom the recusal motions were referred determined to be "largely undisputed" (13a). Furthermore, the Order and the record make clear that Judge Ideman's assertion of "flagrant misconduct" and "outrageous litigation tactics" refer directly to his finding of "blatant disregard" of his orders, and not to some other unspecified activities.

2. The District Court's Order Denying Recusal

Pursuant to the local rules of the Central District of California, the recusal motions in the four cases, brought pursuant to 28 U.S.C. § 455(a), were referred to the Honorable J. Spencer Letts. *See* District Court General Order 224, § 5.0. Judge Letts then convened a hearing on the motions, which is held only if the court finds that a recusal motion is "timely and legally sufficient." *Id.* Nevertheless, at the hearing on October 25, 1991, Judge Letts denied the recusal motions from the bench (5a-17a). The court based its reasoning on a standard wholly irrelevant to a section 455(a) recusal motion: "[I]s the objective reason that you've asserted for believing that [the judge] has some bias sufficient to support a conclusion that he does[?]" (12a).

First, the court accepted as true and undisputed that the framed cover of *Time* magazine did hang in Judge Ideman's chambers (9a). The court, however, held that this fact was irrelevant and that it would therefore not consider it as a ground for recusal (10a, 15a-16a). Again relying on a subjective standard irrelevant to 28 U.S.C. § 455(a), the court repeatedly stated, "I still don't think you can draw any inference from that fact [the framed *Time* cover hanging in

Judge Ideman's chambers] as to Judge Ideman's state of mind or the state of mind of anyone in his chambers." 16a; *see also* 8a-11a, 15a. The court refused to consider or even to permit argument on the inferences that would be drawn by an objective reasonable person.

Second, the court rejected the arguments concerning Judge Ideman's and Special Master Kolt's reactions to the use of a court reporting company owned by Scientologists because "I cannot conclude that the evidence is a pre-existing bias or any other bias that arises from outside the proceeding" (14a). Judge Letts also stated that he did not "disagree with th[e] conclusion" of Judge Ideman that the fact that the owners of the court reporting service were Scientologists "did require looking into." *Id.*

Third, the court rejected the argument concerning defendant Jeglokowski's relationship with Judge Ideman, although its reasoning is somewhat opaque:

> I must say, I'm not awfully persuaded by the government's argument in that case, but since the Scientology position is basically a mirror of the other two positions, without the other two, this one must fall, and I'm not persuaded by the other ones, so I would deny the motion to recuse in that case. *Id.*

Fourth, Judge Letts found that it is "largely undisputed" that "the blatant disregard of [Judge Ideman's] order was not attributable to" the Church (13a). Nevertheless, without any explanation or evidence, Judge Letts speculated that Judge Ideman's reference to "outrageous litigation tactics and/or flagrant misconduct, *id.*, may have involved some other unknown, unspecified actions unrelated to the "blatant disregard of the Court's order." *Id.* He concluded, "I cannot say that it is possible, based on the record before me, to conclude that his statements that both parties had engaged in flagrant misconduct, blatant disregard or outrageous litigation

tactics represent a pre-existing bias that didn't result from the judicial process. I would deny the motion in that case."*Id.*

On November 22, 1991, the district court issued a written order summarily denying the recusal motions (4a).

3. The Court Of Appeals' Decision

On November 1, 1991, the Church filed a petition for mandamus in the Ninth Circuit. The petition was denied on December 4, 1991, in an order that stated in its entirety:

> While reasonable minds might draw different inferences from the facts alleged in the motion for recusal, the court finds that the district court's order denying recusal was not clearly erroneous, and further that the harm alleged in the petition is correctable on appeal. *See Bauman v. United States Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977); *In re Cement Antitrust Litigation (MDL 296)*, 699 [sic] F.2d 1297, 1302 (9th Cir. 1982). Accordingly, the petition for writ of mandamus is denied. The motion to stay is denied as moot.

2a-3a.[12/] The court below denied the petition for rehearing and the suggestion for rehearing *en banc* on January 31, 1992 (1a).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE AVAILABILITY OF MANDAMUS REVIEW OF A DENIAL OF A MOTION FOR RECUSAL PURSUANT TO 28 U.S.C. § 455(a).

At least since *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249 (1957), the courts of appeals have been authorized and directed to use their mandamus jurisdiction under the All

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12/ The court below miscited *In re Cement Antitrust Litigation*. The correct citation is 688 F.2d 1297.

Writs Act, 28 U.S.C. § 1651(a), to exercise "supervisory control" over the district courts when it is "necessary to proper judicial administration in the federal system." *La Buy*, 352 U.S. at 259-60; *see Schlagenhauf* v. *Holder*, 379 U.S. 104, 109-10 (1964). As this Court has recently reiterated, "we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction'", *Mallard* v. *United States District Court*, 490 U.S. 296, 309 (internal quotations omitted); rather, mandamus is proper when the district court has engaged in a "clear abuse of discretion" or "conduct amounting to usurpation of [the judicial] power." *Id.* (internal quotations omitted).

The refusal of a judge to recuse himself when "his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), constitutes just such a clear abuse of discretion and conduct amounting to a usurpation of judicial power. Nothing is more fundamental to the proper functioning of the federal judicial system and due process than a neutral and impartial judge. This interest is so important that actual bias or partiality is not necessary to require a judge's recusal. "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988) (citing S. Rep. No. 93-419, at 5; H.R. Rep. No. 93-1453, at 5); *See, e.g., Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 825 (1986); *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927).

The most effective, meaningful way to prevent the damage to the judicial system and to the litigants that arises when a district court improperly denies a recusal motion is to permit immediate plenary review by way of a petition for a writ of mandamus. For this reason, *every* court to consider the issue, *except* the Ninth Circuit, has held that mandamus is available to correct an improper refusal to recuse under

section 455(a). Nevertheless, the nine courts of appeals outside the Ninth Circuit that permit mandamus review of this issue apply at least three different procedural or substantive rules on mandamus review. Because the issues of judicial impartiality in fact and the public appearance of such impartiality are so important to proper respect for and the functioning of the federal courts, this Court's review is essential to resolve the conflict between the Ninth Circuit and nine other courts of appeals and to insure uniform substantive and procedural appellate review of district court denials of recusal motions pursuant to section 455(a).

Only the Ninth Circuit now takes the view that the theoretical availability of post-judgment appeal from a denial of a motion to recuse under section 455(a) is a sufficient ground to deny a petition for mandamus. *See* 3a. The reliance of the court below on *Cement Antitrust, supra*, makes clear that it denied the petition primarily, if not exclusively, on the ground that mandamus review is unavailable in this situation.[13/] In *Cement Antitrust,* the Ninth Circuit held that the *grant* of a motion to recuse could be reviewed by mandamus, because "the error, if any, cannot serve as a basis for reversal on appeal." 688 F.2d at 1302. The court held, however, that "an order *denying* a motion for disqualification is reviewable on appeal after final judgment," *id.* (emphasis original), which, according to the Ninth Circuit, would "render the exercise of our mandamus authority inappropriate." *Id.*

[13/] Petitioners recognize that the order of the court below also can be read as purporting to address the merits of the petition, but the standard applied -- "[w]hile reasonable minds might draw different inferences from the facts alleged in the motion for recusal, the court finds that the district court's order denying recusal was not clearly erroneous" (2a-3a) -- is such a watered-down (and incorrect) reformulation of § 455(a) as to render meaningless any review by mandamus in the Ninth Circuit. *See* Point II, *infra*.

The court below, in rejecting the petition because "the harm alleged . . . is correctable on appeal" (3a), adhered to the Ninth Circuit's view in *Cement Antitrust* that mandamus review is improper.

The Ninth Circuit's position has been universally rejected, although, as noted, the courts of appeals take at least three different approaches to mandamus review of denials to recuse pursuant to section 455(a). The First, Second, and apparently the Fourth Circuits consider denials of recusal motions both by mandamus petitions and on post-judgment appeals, but they require a heightened showing before the mandamus petition will be granted. *See, e.g., In re United States*, 666 F.2d 690, 694-95 (1st Cir. 1981) ("party seeking the writ of mandamus must show a clear and indisputable right to relief") (internal quotations omitted);[14/] *United States* v. *Chantal*, 902 F.2d 1018, 1021-22 (1st Cir. 1990) (review upon appeal from final judgment after entry of guilty plea; no requirement of "clear and indisputable" right to relief); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312-13 (2d Cir. 1988) (on petition for mandamus, petitioner must clearly and indisputably demonstrate that the district court abused its discretion), *cert. denied*, 490 U.S. 1102 (1989); *id.* at 1314 (explicitly distinguishing standard of review on mandamus from that on direct appeal); *United States* v. *Coven*, 662 F.2d 162, 167-68 (2d Cir. 1981) (post-judgment review of a denial of a motion to recuse), *cert. denied*, 456 U.S. 916 (1982). The clear import of these decisions, particularly *Drexel Burnham*, is that a denial of the mandamus petition does not preclude a direct appeal after final judgment on the recusal issue. *See* 861 F.2d at 1314.

[14/] In *In re United States, supra*, the United States sought mandamus to obtain review of a denial of a § 455(a) recusal motion. *See also Bell* v. *Chandler*, 569 F.2d 556 (10th Cir. 1978).

The decisions of the Fourth Circuit, which permit both mandamus and post-judgment appeal, are unclear whether the court applies a more stringent substantive standard on mandamus review than on direct appeal. *See In re Beard*, 811 F.2d 818, 826-27 (4th Cir. 1987) (discussing in general the heightened showing necessary for granting a mandamus petition, but then apparently not applying that heightened standard in its mandamus review of a denial of a recusal motion); *United States* v. *Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989) (post-conviction review of denial of recusal motion).

A second, "majority" approach, followed in the Third, Fifth, Eighth, Tenth, and apparently the Sixth Circuits, is to review denials of motions to recuse pursuant to section 455(a) either by mandamus or by direct appeal after final judgment, and to apply identical substantive standards in determining whether recusal is required, whether by mandamus or on direct appeal.[15/] *See, e.g.*, *Moody* v. *Simmons*, 858 F.2d 137, 143 (3d Cir. 1988) ("A judge who was obliged to recuse acts outside his jurisdiction"; petition for mandamus lies), *cert. denied*, 489 U.S. 1078 (1989); *Edelstein* v. *Wilentz*, 812 F.2d 128, 131 (3d Cir. 1987) (reviewing denial of recusal motion upon direct appeal of final judgment); *In re Faulkner*, 856 F.2d 716, 720-21 (5th Cir. 1988) (granting petition for a writ of mandamus); *In re Continental*, 901 F.2d 1259, 1262-63 (5th Cir. 1990) (review upon direct appeal from final judgment);[16/] *Liddell* v. *Bd. of Educ. of City of St. Louis*,

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[15/] Obviously, in these circuits, a party could not obtain substantive review by mandamus *and* on direct appeal, since failure on the merits of the recusal issue on mandamus would preclude further identical substantive review, absent new evidence of the appearance of partiality.

[16/] The Eleventh Circuit has reviewed denials of recusal motions on appeal from a final judgment, *see McWhorter* v. *City of Birmingham*, (continued...)

677 F.2d 626, 643 (8th Cir.) (denial of motion to recuse "is reviewable by a petition for a writ of mandamus"), *cert. denied*, 459 U.S. 877 (1982); *Perkins* v. *Spivey*, 911 F.2d 22, 33 (8th Cir. 1990) (review of denial of motion to recuse on direct appeal); *Bell* v. *Chandler*, 569 F.2d 556, 559 (10th Cir. 1978) ("There is no question but that a mandamus petition may be used to force the disqualification of a district court judge"); *Franks* v. *Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986) (review of denial of recusal motion on direct appeal).

The Sixth Circuit, in a recent *en banc* decision, conformed its position with the dominant view "that we can and should consider a petition for mandamus following a district court's denial of a motion to disqualify" pursuant to section 455(a). *In re Aetna Casualty & Surety Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990). As that court did not hold that review of a denial of a motion to recuse *must* be brought by immediate mandamus petition, presumably it will continue to entertain post-judgment appeals on this issue. *See, e.g., Schultz* v. *Newsweek, Inc.*, 668 F.2d 911, 919-20 (6th Cir. 1982). In reviewing the merits of the mandamus petition in *Aetna*, the Sixth Circuit applied the same substantive standards as it has applied in post-judgment appeals. 919 F.2d at 1143.

The Seventh Circuit follows a third path, holding "that when a judge denies a motion to disqualify himself under § 455(a), the moving party's *sole recourse* is to apply to this

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[16/] (...continued)

906 F.2d 674, 678 (11th Cir. 1990), but it has apparently not yet considered whether mandamus review is available. Presumably, it would agree with the Fifth Circuit that mandamus is available. *See In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 961 n.4 (5th Cir.) (recognizing "authority to review on mandamus the question of disqualification"), *cert. denied*, 449 U.S. 888 (1980); *Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*) (adopting prior decisions of the Fifth Circuit).

court immediately for a writ of mandamus." *United States* v. *Balistrieri*, 779 F.2d 1191, 1205 (7th Cir. 1985) (emphasis added), *cert. denied*, 475 U.S. 1095 (1986); *see Union Carbide Corp.* v. *U.S. Cutting Service, Inc.*, 782 F.2d 710, 713 (7th Cir. 1986); *Taylor* v. *O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989). The Seventh Circuit will refuse to consider section 455(a) recusal issues on direct appeal from a final judgment. *See Balistrieri*, 779 F.2d at 1205; *O'Grady*, 888 F.2d at 1201.[17/]

The Seventh Circuit provides two related reasons for its position. First:

> if a judge proceeds in a case when there is (only) an appearance of impropriety in his doing so, the injury is to the judicial system as a whole and not to the substantial rights of the parties. The parties in fact receive a fair trial, even though a reasonable member of the public might be in doubt about its fairness, because of the misleading appearances.

Balistrieri, 779 F.2d at 1204-05. The second rationale is:

> that of preventing injury to the public perception of the judicial system before it has a chance to occur. If a party is deprived of his substantial rights in a trial before an actually biased judge, the harm can be remedied (though not costlessly) by a new trial before an unbiased judge. But the harm to the public's perception of the judicial system when a judge who appears to be biased proceeds in a case is more difficult to correct. *Prevention in such circumstances is clearly preferable to attempts to cure.*

[17/] In ironic contrast to the Ninth Circuit, which only reviews *grants* of recusal motions on mandamus petitions, *Cement Antitrust*, 688 F.2d 1302, the Seventh Circuit has held that it has *no* jurisdiction to review a *grant* of a motion to recuse because "[l]itigants have no protectable interest in having their case heard by one judge rather than another." *Balistrieri*, 779 F.2d at 1205 n.14.

Id. at 1205 (emphasis added); *see also Union Carbide*, 782 F.2d at 712-13. In its substantive review, the Seventh Circuit applies a standard similar to that adopted by this Court in *Liljeberg, supra*, and it does not require a heightened showing before the mandamus petition may be granted. *See Durham* v. *Neapolitan*, 875 F.2d 91, 97 (7th Cir. 1989).

No method of appellate review of a denial of a motion to recuse under section 455(a) is costless. The question, in light of the disarray among the circuits, is which approach best effectuates the purpose of section 455(a) of protecting the integrity of the federal court system from even the appearance of partiality, best conforms to the proper usages of mandamus review, and uses judicial resources most efficiently.

Petitioners respectfully submit that the universally-rejected position of the Ninth Circuit that mandamus review of a denial to recuse is unavailable fails on each of these counts. First, as noted, the usurpation of judicial power inherent in the refusal of a judge to recuse himself when "his impartiality might reasonably be questioned" is particularly appropriate for mandamus relief. Second, because the harm is to the public perception of the fairness of the judicial system as much as to the parties, the issue should be resolved at the earliest possible opportunity. *See Balistrieri*, 779 F.2d at 1204-05; *In re United States*, 666 F.2d at 694. Indeed, it may well be impossible to remedy the harm to the public perception of the impartiality of the federal judiciary upon post-judgment appeal. *See Balistrieri*, 779 F.2d at 1205. Finally, the obvious waste in judicial resources in the Ninth Circuit's approach is highlighted by *Preston* v. *United States*, 923 F.2d 731 (9th Cir. 1991), in which the Ninth Circuit, in reversing a denial of a motion to recuse, stated, "We recognize that this case has been tried once to judgment and that a retrial will involve considerable additional expense, perhaps with the same result as the first trial. This is unfortunate." *Id.* at 735.

Clearly, proper judicial administration and the preservation of the appearance of justice would have been better served had the issue been raised and resolved before trial upon a petition for a writ of mandamus.

The approach of the First and Second Circuits, in which mandamus petitions are considered, but which impose extremely stringent standards for relief, defeats the purpose of section 455(a) and leads to a waste of judicial resources. The creation of the legalistic requirement that the district court "clearly and indisputably . . abused its discretion," *Drexel Burnham*, 861 F.2d at 1312-13, hardly serves to eliminate a public perception that a judge's impartiality might reasonably be questioned. As this Court stated in *Liljeberg*,

> People who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.

486 U.S. at 865 (footnote omitted); *see Drexel Burnham*, 861 F.2d at 1320 (Lumbard, J., dissenting). Moreover, by requiring a greater showing to obtain mandamus relief, the court necessarily invites a post-judgment appeal on this issue. The result is both a waste of judicial resources in permitting litigants two "bites at the apple", and a tremendous embarrassment to the judicial system if the relief is ultimately granted after the same court initially denied the relief on the ground that, although reasonable people might question the judge's impartiality, the issue was not so "clear and indisputable" as to grant recusal by way of mandamus. If mandamus review is to be had, the substantive standard for recusal should be no greater than that applied by this Court in *Liljeberg*. In other words, if the court of appeals concludes that a judge's impar-

tiality might "reasonably be questioned," then the right to relief under § 455(a) is clear and indisputable.[18/]

The Seventh Circuit's requirement that relief must be by mandamus necessarily forces litigants to file petitions even though they may ultimately settle the case or prevail on the merits. That court, however, has not found its approach to be unduly burdensome, and it has noted that petitions will be denied in "routine" cases "with sanctions, if the petition for mandamus is frivolous." *Union Carbide, supra,* 782 F.2d at 712. Moreover, no opposition to a mandamus petition may be filed unless the court so requests, Fed.R.App.P. 21(b), which helps conserve judicial resources for the most serious petitions.

The Seventh Circuit may also be overstating the case somewhat when it asserts that the *only* harm pursuant to an improper denial of a recusal motion under section 455(a) is to the public perception of the judiciary and not to the parties and, therefore, post-judgment relief is unavailable because it cannot remedy the harm to the public's perception. A *party's* perception that it received a fair trial before an impartial judge is also an important consideration. Thus, a party may well be entitled to post-judgment relief if the judge's impartiality in the case might reasonably be questioned. Nevertheless, the Seventh Circuit is clearly correct that it is far better to remedy the recusal issue immediately and that review on

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[18/] Assuming that the court below did consider the merits, the Ninth Circuit's requirement that the district court's decision cannot be disturbed unless it is "clearly erroneous" (3a) raises the same problems as the standard applied in the First and Second Circuits. Indeed, the court below not only explicitly invited post-judgment appeal on this issue, *id.*, but, by finding that "reasonable minds might" differ on the facts (2a), it has virtually invited an appellate finding that recusal is required after what promises to be three lengthy, complex trials. *See* Point II, *infra.*

mandamus does not require heightened scrutiny of the substantive issue. Its rule also has the advantage of certainty.[19/]

The majority approach appears to best satisfy the various concerns at stake. Mandamus review is available to remedy immediately the harm to the public's perception of the integrity of the judiciary, but neither the parties nor the courts are forced to engage in mandamus review to preserve the recusal issue. Moreover, a mandamus petitioner receives full substantive review pursuant to section 455(a), and thus would be unable to relitigate the issue after final judgment.

While the majority rule permits a party to raise the issue of a denial of a recusal motion on post-judgment appeal, that fact should not preclude mandamus review under the decisions of this Court. This is so because the most significant harm caused by an improper denial of a recusal motion under section 455(a) is to the public's perception of the appearance of judicial impartiality and fairness in the administration of the federal judicial system, a harm which cannot be fully protected by the right of an aggrieved party to appeal after losing in the district court. Indeed, no remedy may exist because the aggrieved party may ultimately prevail in the district court or, fearing an apparently biased judge, be forced into settlement, results which may not alleviate the public's perception of partiality. Thus, the denial of a recusal motion under section 455(a) presents a classic case for the use of supervisory mandamus, such as in *La Buy, supra,* or *Schlagenhauf, supra,*

19/ *Liljeberg, supra,* which has thus far been this Court's only substantive consideration of section 455(a), arose in the unusual context in which the appearance of partiality was discovered only after final judgment was entered. 486 U.S. at 850. In such cases, post-judgment review is the only available recourse.

in which mandamus was permitted despite the theoretical ability of an aggrieved party to raise the issue on appeal.

Whether this Court ultimately determines that the Seventh Circuit's approach or the majority approach best preserves the public perception of the impartiality of the federal judiciary, this Court's review is necessary to make clear that the Ninth Circuit's approach is incorrect and that a uniform rule is necessary to help "promote public confidence in the integrity of the judicial process." *Liljeberg,* 486 US. at 860.

II. ASSUMING THE COURT BELOW ENGAGED IN SUBSTANTIVE REVIEW, THE STANDARD IT APPLIED IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OF EVERY OTHER CIRCUIT AND UNDERMINES THE PURPOSE OF § 455(a)

Assuming the court below did reach the merits of the petition, the unique standard it claimed to have applied so dilutes section 455(a) as to render recusal pursuant to mandamus meaningless in the Ninth Circuit. Moreover, the standard is inconsistent with decisions of this Court and every other court to consider the question. As this Court has stated, "If [a judge] concludes that his 'impartiality might reasonably be questioned,' then he should also find that the statute has been violated." *Liljeberg*, 486 U.S. at 861. The courts are in universal agreement that the standard to be applied is an objective one, based on the perceptions of a reasonable lay member of the public. *See id.* at 860-61; *Preston, supra,* 923 F.2d at 734; *Chantal, supra,* 902 F.2d at 1022-24; *In re Continental, supra,* 901 F.2d at 1262 (5th Cir. 1990); *Parker v. Connors Steel*, 855 F.2d 1510, 1524 (11th Cir. 1988), *cert. denied,* 490 U.S. 1066 (1989).

The court below stated that even when "reasonable minds might draw different inferences from the facts," a district court order denying recusal will not be overturned unless it is "clearly erroneous" (2a-3a). The court's finding that "*reason-*

able minds might draw different inferences," however, effectively parallels the statutory language that recusal is mandated whenever a judge's "impartiality *might reasonably be* questioned." 28 U.S.C. § 455(a). If there is any relevant distinction between these two standards, it would certainly escape an objective reasonable lay person. "[P]ublic confidence in the integrity of the judicial process," *Liljeberg,* 486 U.S. at 860, is understandably and properly shaken when a court purports to draw such a hypertechnical semantic distinction in this sensitive area. On its face, the statute, by its use of the term "might", clearly does not require *every* reasonable person to come to the same conclusion. Rather, if, as the Ninth Circuit concluded here, *some* "reasonable minds" might question Judge Ideman's impartiality, then it is inescapable that his "impartiality might reasonably be questioned," 28 U.S.C. § 455(a), and recusal is mandated. *Liljeberg*, 486 U.S. at 861.

The Ninth Circuit avoided this statutorily-mandated result here by imposing a requirement that the district court's decision cannot be disturbed unless it is "clearly erroneous." This idiosyncratic demand, not found in any other circuit, derives from earlier mandamus cases in which the Ninth Circuit developed the convoluted theory that a petition would be granted only when the district court's decision was not "clearly erroneous as a matter of law," *Bauman, supra,* 557 F.2d at 654-55; *Cement Antitrust,* 688 F.2d at 1305, a standard which the court admitted "is elusive at best." *Id.*[20/] The court below, in its reliance upon *Cement Antitrust* and

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[20/] To further complicate matters, the court attempted to explicate its unique "clearly erroneous as a matter of law" test by importing the test for determining when a finding of fact is clearly erroneous. *Cement Antitrust,* 688 F.2d at 1305.

Bauman, thus determined that the district court's findings were not clearly erroneous as *a matter of law*.[21/]

What is lost in the Ninth Circuit's legalistic approach to the recusal issue is "[t]he very purpose of § 455(a), [which] is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 486 U.S. at 865. No reasonable lay observer (let alone most attorneys or judges) can be expected to follow the Ninth Circuit's tortuous reasoning here, in which it found that Judge Ideman's impartiality might be questioned by "reasonable minds," but the moving party must nevertheless proceed to trial before that apparently partial judge because an insurmountable and "elusive at best" "clearly erroneous as a matter of law" standard is applied when the issue is raised by mandamus, although the court has acknowledged that the movant might well (indeed, should) prevail on a post-judgment appeal of this issue after being forced to undergo three lengthy, extremely costly trials. Neither Congress nor this Court could have contemplated such a bizarre result. If mandamus review is to be permitted, as petitioners have urged, and as every other court has agreed, Point I, *infra*, then public confidence in the appearance of impartiality can only be preserved if the courts adhere to the statutory language, *i.e.*, if the judge's impartiality might reasonably be questioned, he should be recused. *Liljeberg*, 486 U.S. at 861.

This petition should be granted so that this Court may conform the Ninth Circuit's idiosyncratic, insurmountable,

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[21/] This conclusion is further emphasized by the fact that the key issues here are whether the district court erred as a matter of law in holding that the framed cover of *Time* hanging in Judge Ideman's chambers is legally irrelevant under § 455(a) (9a), and on whether a § 455(a) recusal motion requires evidence "sufficient to support a conclusion that [a judge] does" "ha[ve] some bias" (12a), rather than that his "impartiality might reasonably be questioned", 28 U.S.C. § 455(a).

"elusive at best" "clearly erroneous" standard to the correct view that when the statutory standard is met, recusal is required under § 455(a), whether review is by mandamus or by direct appeal.

III. RECUSAL IS CLEARLY MANDATED UNDER THE CORRECT LEGAL STANDARD

Under this Court's standard in *Liljeberg*, *supra* (or even under the Ninth Circuit's "clearly erroneous as a matter of law" test), recusal is clearly mandated in this case. The undisputed presence of the framed *Time* magazine cover on the wall of Judge Ideman's chambers alone would lead any reasonable person to question Judge Ideman's impartiality. In conjunction with the other evidence, the conclusion that Judge Ideman's impartiality might reasonably be questioned is inescapable. The district court reached a contrary result because it applied incorrect legal standards in which it required evidence sufficient to show actual bias by the presiding judge, which bias had to be preexisting and extrajudicial, and it looked not to the views of a reasonable person, but to Judge Ideman's state of mind.

It is difficult to imagine that a United States district court judge who is sitting on three major cases involving various churches of the Scientology religion would permit a framed copy of the May 6, 1991, *Time* magazine cover to hang in his chambers, particularly given that the accompanying article takes sides on key issues in the cases before him. It is even more difficult to imagine, however, that another judge could find this fact irrelevant as a matter of law. As Judge Letts made no fact findings as to the impact of the framed cover on a reasonable person, no deference is due his legal determinations, which are, in any event, clearly incorrect and an abuse of whatever discretion he may have.

The district court simply ignored the correct legal standard, which is how the framed cover hanging in Judge Ideman's chambers would appear to an objective reasonable

person. As this Court has stated, "it is critically important [under § 455(a)] to identify the facts that might reasonably cause an objective observer to question [the judge's] impartiality." *Liljeberg*, 486 U.S. at 865. The relevant facts include: 1) Judge Ideman sits on four major cases involving various Churches of Scientology; 2) the cover speaks for itself, pronouncing "SCIENTOLOGY: The Cult of Greed"; 3) any reasonable person would believe (correctly) that a judge controls and is responsible for his chambers, and is aware of what hangs on the walls;[22/] 4) any reasonable person would conclude that the Judge and his law clerks would be aware of the contents of the accompanying article; 5) any reasonable person would further conclude that both the cover and the article (whether its contents are true or false) constituted an extremely strong attack on Scientology, directly supported the Aznarans' position on key issues in their litigation, and mocked Scientology's status as a religion; and 6) the decision to frame and to hang a magazine cover takes some conscious effort.

Petitioners submit that these facts, standing alone, would lead any "objective observer to question Judge [Ideman's] impartiality." *Liljeberg*, 486 U.S. at 865. No reasonable person would find these facts to be irrelevant. That Judge Letts reached a different result is not because he is "unreasonable", but because he applied an incorrect legal standard, in which he focused on Judge Ideman's subjective state of mind (11a, 15a-16a) and demanded evidence sufficient to

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[22/] Even if Judge Ideman was in fact unaware of the framed, mounted cover in his chambers (which is inherently incredible), that fact would be irrelevant; "advancement of the purpose of [§ 455(a)] -- to promote public confidence in the integrity of the judicial process . . . -- does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." *Liljeberg*, 486 U.S. at 859-60.

show actual bias by the court (12a).[23/] No deference is due Judge Letts' conclusion regarding the *Time* cover.

The additional facts in the recusal motions, whether sufficient standing alone, reinforce the inescapable conclusion that Judge Ideman's and Special Master Kolts' impartiality might reasonably be questioned. Thus, no reasonable person would believe that Judge Ideman would be "very upset" by Mr. Fagelbaum's letter merely because of the alleged minor delays in the receipt of the transcripts, or that the matter of the delays alone prompted Judge Ideman to make the "only" phone call he has made to the Special Master in three years. Given that the Special Master claims he informed Judge Ideman that the only problem was delay, yet persisted in his unsubstantiated attacks on the integrity of the court reporters and the reporting service merely because the owners are Scientologists, would lead a reasonable person to conclude that Judge Ideman, too, raised questions about the integrity of the reporting service based on the religious affiliation of its owners. Again, this logical inference would lead any reasonable person to question Judge Ideman's and Special Master Kolts' impartiality, as it is no different than if they had questioned the veracity and integrity of a court reporting service owned by a Jewish person who had made financial contributions to his religion, in, for example, a defamation action between an anti-Semitic Holocaust revisionist historian and B'nai B'rith.

Indeed, Judge Letts did not conclude otherwise. Rather, he stated, "I cannot conclude that the evidence is a pre-existing bias or any other bias that arises from outside the

---

[23/] Judge Lett's misapprehension of the correct legal standards is exemplified by his reliance upon *United States* v. *Grinnell Corp.*, 384 U.S. 563, 582-83 (1966), a case which involved claims of actual bias and prejudice. *See 12a, 16a.*

proceeding" (14a). This standard, however, is irrelevant under section 455(a), in which the inquiry is not one of actual bias, but whether "the facts . . . might reasonably cause an objective observer to question [the judge's] impartiality." *Liljeberg*, 486 U.S. at 865. Moreover, the very nature of this objective inquiry into the appearance of partiality renders irrelevant whether the bias is preexisting or extrajudicial. *See, e.g., Chantal, supra*, 902 F.2d at 1022-24.

Assuming that some reasonable person would still be wavering at this point, the fact that: 1) Judge Ideman (who has the *Time* cover hanging in his chambers and has questioned the integrity of a court reporting service because its owner is a Scientologist) has excoriated the Church and its counsel for "blatant disregard" of his orders when it is "largely undisputed . . . that the blatant disregard of the Court's order was not attributable to it" (13a); and 2) Judge Ideman's friend and former colleague is a defendant in one of the cases before him, would eliminate any possible remaining doubts in a reasonable person that Judge Ideman's "impartiality might reasonably be questioned," and his recusal is therefore mandated pursuant to 28 U.S.C. § 455(a).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated: February 25, 1992 Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-70659
D.C. No. CV-88-1786-JMI
(Central California)
January 30, 1992

CHURCH OF SCIENTOLOGY INTERNATIONAL, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

VICKI J. AZNARAN, *et al.*,
Real Parties
In Interest.

Before:

FARRIS, POOLE AND NORRIS,
Circuit Judges

ORDER

The petition for rehearing and suggestion for en banc review are denied. No further filings will be accepted in this closed docket number.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-70659
D.C. No. CV-88-1786-JMI
(Central California)
December 4, 1991

CHURCH OF SCIENTOLOGY INTERNATIONAL, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

VICKI J. AZNARAN, *et al.*,
Real Parties
In Interest.

Before:

FARRIS, POOLE AND NORRIS,
Circuit Judges

ORDER

While reasonable minds might draw different inferences from the facts alleged in the motion for refusal, the court finds that the district court's order denying refusal was not

clearly erroneous, and further that the harm alleged in the petition is correctable on appeal. *See Bauman* v. *United States Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977); *In re Cement Antitrust Litigation (MDL 296)*, 699 F.2d 1297, 1302 (9th Cir. 1982). Accordingly, the petition for writ of mandamus is denied. The motion to stay is denied as moot.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 88-1786 JMI
November 22, 1991

VICKI J. AZNARAN AND RICHARD N. AZNARAN,
Plaintiffs,

v.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, *et al.*,
Defendants.

ORDER DENYING MOTION TO RECUSE THE HONORABLE JUDGE JAMES M. IDEMAN

The Motion of defendants CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al., to recuse the Honorable Judge James M. Ideman came on for hearing regularly on October 25, 1991.

Having reviewed the papers filed in connection with this matter, having heard oral argument, and being fully apprised of the relevant facts and law,

IT IS HEREBY ORDERED that the Motion of defendants CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al., is DENIED.

IT IS SO ORDERED.

DATED: November 22, 1991

J. Spencer Letts
United States
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE J. SPENCER LETTS, PRESIDING
UNITED STATES DISTRICT COURT JUDGE

CHURCH OF SCIENTOLOGY, ETC., *et al.*,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, ETC., *et al.*,
Defendants.

CV-90-2042-JMI

TRANSCRIPT OF PROCEEDINGS

Friday, October 25, 1991

Los Angeles, California

Motion to Recuse Judge Ideman

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* * *

Los Angeles, California, Friday,
October 25, 1991; 2:10 o'clock p.m.

THE CLERK: CV-90-2042-JMI, Church of Scientology versus United States of America; CV-85-711-JMI, Religious

Technology Center versus Robin Scott; CV-85-7197-JMI, Religious Technology Center versus Larry Wollersheim et al.; and CV-88-1786-JMI, Vicki Aznaran versus Church of Scientology, et al.

* * *

MR. COOLEY: Well, I'd like to address that *Time* magazine article, Your Honor, because I think it's crucial.

THE COURT: No, it's not.

MR. COOLEY: And I think in and of itself, it mandates --

THE COURT: Sir?

MR. COOLEY: -- recusal.

THE COURT: I'm sorry.

* * *

THE COURT: You don't know, and I don't know, who hung that picture, why they hung it, or what it meant. It's a picture of a cover of a magazine.

I don't know why it is there, but you may not draw inferences about me from anything you can find sitting in my chambers.

MR. COOLEY: I respectfully submit that simply is not so.

THE COURT: But that is going to be a matter that is going to be up to the judge, and I don't agree with you, so I don't want to hear what's in the article.

The article is not pasted on his wall. The *Time* magazine cover is someplace in his chambers, I take it. My suspicion is that if it were in his office, you would have told me that, so I suspect it's not there.

* * *

THE COURT: I would assume, because it's so easily checked, that it must be true; if it isn't true, it occurs to me the defendants would probably find out it's not true and tell me that.

Without being difficult about it, different things capture different people's opinions, and people have things they like, things that tickle their sense of humor. There are a lot of reasons why people wear the things they wear, display the things they display.

I just simply think it's inappropriate to draw inferences about any individual who works in those chambers because there is something hanging on the wall in those chambers that I don't know how they got there. I can't get there from here, but if I thought it was relevant, I would think it was appropriate to consider it.

* * *

The *Time* magazine thing, while I rather thought that the defendants might want to address it, it didn't seem then and doesn't seem now anything you can draw any inferences from.

* * *

What I have said consistently -- and I haven't asked you, and there seems to be a high degree of desire to say on the record things about that article, and I don't choose to hear them.

What I have said is that a picture hanging on a wall that nobody has described for me what wall it's on, who put it there, why it's there, or any of those things, I don't think you can draw any inference from the existence of that picture because people do things for different reasons.

In my judgment it would be entirely inappropriate to draw the inference, any inference, from the mere existence of a *Time* magazine cover in a frame on any wall anywhere. It's not enough to draw an inference from. And I don't care what the underlying article said.

* * *

THE COURT: I've heard that argument, you've made that argument. I would respond -- and this is as far as I'm going to go to this -- that case has generated a lot of paper, it's caused Judge Ideman and his staff to do a lot of work, it is a case that is known to exist -- *Time* magazine is a widely circulated, well known publication -- a case that has generated, I presume, a lot of attention and a lot of work in that office, made its way to the cover of *Time* magazine, and somebody undertook to take that cover and put it on the wall.

There is no question that that cover displays some notoriety. It doesn't, in my judgment, display any attitude in and of itself of anybody who put it there.

Time magazine has independent significance. This lawsuit in that chambers, if it doesn't occupy a lot of attention, I'd be surprised.

I don't think you can infer from *Time* magazine, which is independent, as I said, its portrayal of whatever it was chosen to portray, I don't think you can take that as evidence of any state of mind for anybody that chose to hang it there. I simply don't believe that, so I don't credit it for that.

* * *

THE COURT: I understand the point, and I don't think so, because these cases have been before Judge Ideman for a long time, and there is the corresponding consideration that if it is true that what the Church of Scientology doesn't like about Judge Ideman is that reaction to the evidence that they've put before him, and that's why they want a different judge, the appearance of impropriety to the other people of allowing a change at this late stage is at least as high.

The law is clear that it has to be evidence and reason for bias that pre-exists the case itself, it cannot be things that come out of the case itself.

With a case that's gone on for a long time, there is always reason to ask the question if the real reason, if people want a change of judge, isn't because they have some inkling about what the judge thinks about what he's already seen about the case.

That is not an appropriate basis for refusal.

* * *

THE COURT: I understand your position, and I'm now finished hearing argument. I will, before I address the decision, say again what I just said.

After a case has gone on for a long time, then the appearance of impropriety of permitting a judge to be replaced, if there is insufficient objective reason for it, is a greater appearance of impropriety than refusing to have him replaced.

We are left with the issue, is the objective reason that you've asserted for believing that he has some bias sufficient to support a conclusion that he does.

* * *

THE COURT: *Time* magazine is an entity, it's a magazine with a large circulation. It has independent significance that has nothing to do with this lawsuit. That's what I said.

* * *

THE COURT: You will now having a ruling.

As I've indicated, the law is clear, the bias must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. That is the holding in the case of *United States versus Grinnell*. That is the issue to be decided.

The things in the case of Aznaran versus the Church of Scientology, as I understand the allegation, the thing that is thought to demonstrate the bias is that Judge Ideman accused

both parties of flagrant misconduct, blatant disregard of the Court's orders and outrageous litigation tactics.

The Church of Scientology, as I understand it, largely undisputed, says that the blatant disregard of the Court's order was not attributable to it.

The flagrant misconduct, that's sort of an undefined phrase, and outrageous litigation tactics is an undefined phrase, too.

To the extent that the blatant disregard of the Court's order was confined to the other party, the problem, as I see it, is simply in the use of the conjunctive "and."

The conclusion drawn that the barrage of paper and the barrage of orders that he drew, to call it outrageous litigation tactics and/or flagrant misconduct, even if this Court were to disagree with those conclusions, which I am not saying I do, I'm simply saying, if I did disagree with those conclusions, they would not, in my judgment, show any bias that results from anything but the judicial process.

I don't know whether that sort of thing that has happened at this hearing has happened in Judge Ideman's court. It has not been alleged, but I would have considered it flagrant misconduct.

I don't know whether I would call it outrageous litigation tactics or not, but I cannot say that it is possible, based on the record before me, to conclude that his statements that both parties had engaged in flagrant misconduct, blatant disregard or outrageous litigation tactics represent a pre-existing bias that didn't result from the judicial process. I would deny the motion in that case.

I'm considering them altogether, so I would put them altogether.

The next one is Religious Technology Center versus Robin Scott. There, as I understand the issue, Special Master Kolts, who had not received a transcript from a June 19 hearing, noted that fact and said that he had learned that the reporter and her husband were major financial contributors to Scientology, and that he had a doubt on the verification of disinterest.

In my judgment, the subsequent conduct by Judge Ideman did not accept at face value that there was a problem, he simply left the question open and said that it did require looking into.

I don't disagree with that conclusion. That is a conclusion again that he drew in the course of the litigation based on what he had seen of the entire litigation and the particular fact, and having said no more than, so far as I can tell from the record, that it should be looked into, I cannot conclude that the evidence is a pre-existing bias or any other bias that arises from outside the proceeding. I would therefore deny the motion to recuse in all cases based on those two sets of factors.

The third one is Church of Scientology of California versus United States, Sandra Baker. I must say, I'm not awfully persuaded by the government's argument in that case, but since the Scientology position is basically a mirror of the other two positions, without the other two, this one must fall, and I'm not persuaded by the other ones, so I would deny the motion to recuse in that case.

I think I have spoken at more than sufficient length about the *Time* magazine thing. I don't choose to dignify this proceeding with anything that's in the article. The article is what it is. Whether it is true on its own terms or whether it's not true on its own terms, I don't care.

I haven't read that article, and while I did read the characterizations of that article that were made by the Church of Scientology in this proceeding, I didn't really pay a lot of attention to the opposition to it, so that what I know about that article is what the Church has told me about that article.

The reason for that is because as I have said, in my judgment, the case in Judge Ideman's Chambers I would expect to be considered a major case.

If the subject of a major case in a judge's chambers appears on the cover of *Time* magazine, I simply don't think anybody can draw any inferences that there is some extra-judicial bias from the fact that that is there, and I don't make that inference.

And it's not in my chambers, and I don't think you could draw that inference if it were in my chambers. I don't think there is any inference that you could draw from that.

And that is an article that I did not read. Although I did read it for purposes of considering this motion, I don't think it's content can fairly be ascribed as being a reflection of the state of mind about this party just because that cover is someplace in Judge Ideman's Chambers.

I don't know how it got there, I don't know who put it there. I don't know that it's there, but I am accepting as true for the purpose of this ruling that it is there at this very

minute. I don't know that it is, nobody said that; it may not be.

I am assuming that it was there for purpose of decision. I'm assuming that it is there, and I still don't think you can draw any inference from that fact as to Judge Ideman's state of mind or the state of mind of anybody in his chambers.

That is a ruling, and unless there is something further --

* * *

THE COURT: And then I was even more troubled at what appeared to be a very conscious and strong attempt to force discussion of that article into this proceeding.

If it is true that there is nothing new here -- and that I haven't analyzed it -- if it is true that there is nothing new here but that *Time* magazine article, then I think the question of sanctions has to be considered with care.

* * *

THE COURT: If I reconsider, I'll give you another opportunity to reargue. Right now I'm not going [to] do sanctions. I'll look at it again. If I reconsider, we'll have to have further opportunity to argue.

I'm going to say this -- and the record will reflect it -- in my judgment, by the *Grinnell* standard -- the Supreme Court of the United States -- this was a very, very weak motion.

Were it to be done a third time, I would expect sanctions to be issued because I am very doubtful that this motion should have been filed at all.

The *Time* magazine thing, I really don't think people ought to differ about its significance, but this was filed long before, as you put it, you knew about that.

The other grounds are very, very weak, very weak, and were another such motion ever to be filed with no stronger grounds than those, if it got to me, I know I would sanction for it, but that hasn't happened yet.

* * *

THE COURT: Anything else for today; if not, we'll be in recess.

BEST AVAILABLE COPY

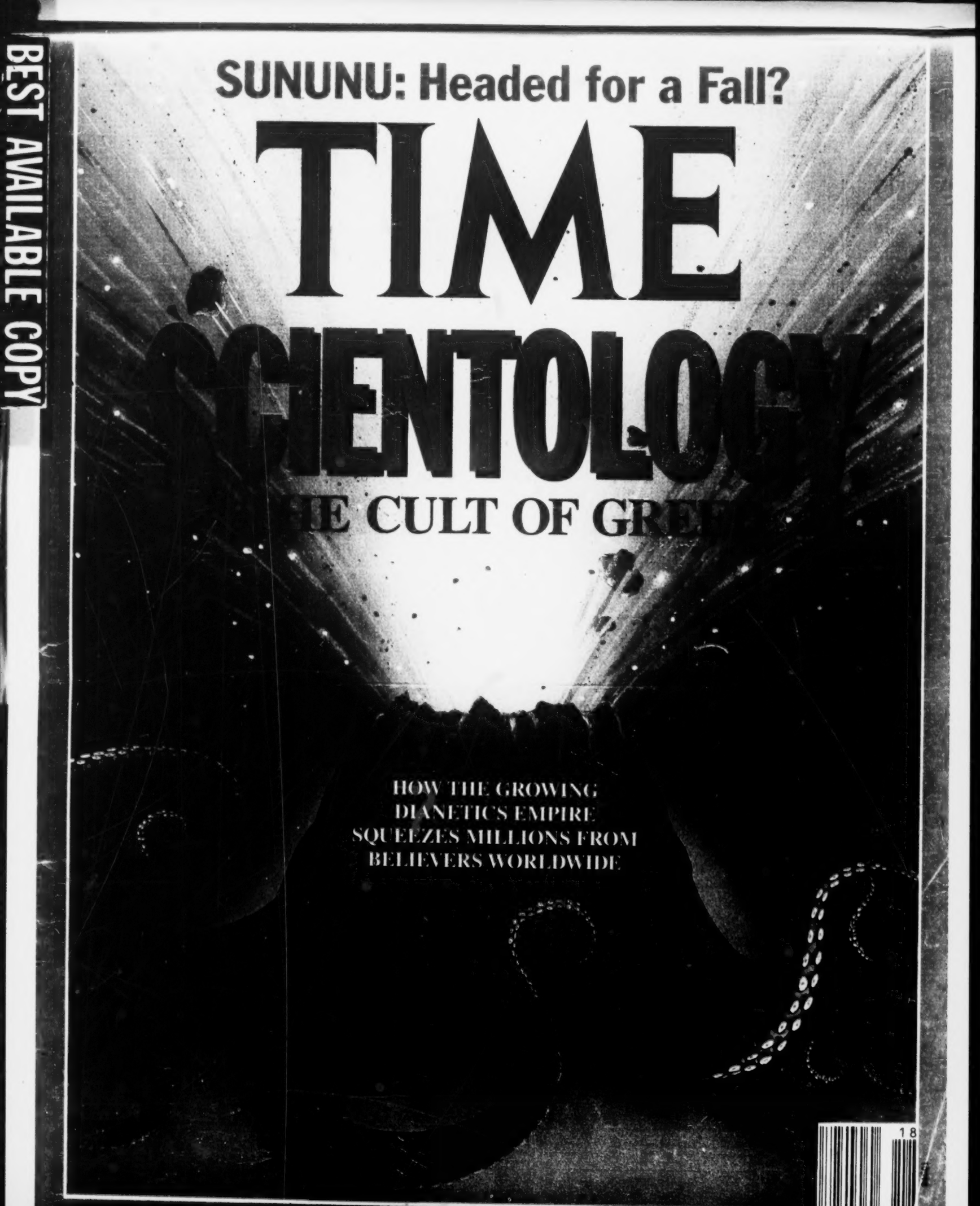
SUNUNU: Headed for a Fall?

TIME

SCIENTOLOGY

THE CULT OF GREED

HOW THE GROWING DIANETICS EMPIRE SQUEEZES MILLIONS FROM BELIEVERS WORLDWIDE



No. 91-1376

Supreme Court, U.S.
FILED
APR 23 1992
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY INTERNATIONAL, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA, et al.,
Respondent.

v.

DAVID MAYO, et al.,
Real Parties In Interest.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 23, 1992

Bowne of Los Angeles, Inc., Law Printers. (213) 627-2200.

QUESTIONS PRESENTED

1. Did the court of appeals deny petitioners' petition for writ of mandamus solely on the ground that mandamus review of a denial of a motion for recusal is uniquely unavailable in the Ninth Circuit?

2. Did the court of appeals properly apply a "clearly erroneous as a matter of law" standard as one of its guidelines when reviewing by way of mandamus the district court's order denying petitioners' motion for recusal?

3. Did the court of appeals properly conclude that the district court's order denying recusal on the alleged grounds that either the district court judge's "impartiality might reasonably be questioned" 28 U.S.C. § 455(a), or that "he has a personal bias or prejudice concerning [petitioners]" 28 U.S.C. § 455(b)(1), was not "clearly erroneous?"

PARTIES AND PROCEEDINGS BELOW AND RULE 29.1 LIST

The United States District Court for the Central District of California is a Respondent in this Court and was the respondent below.

Vicki J. Aznaran; Richard N. Aznaran; United States of America; Sandra Baker; Baldemar Gomez; Charles Jeglikowski; Sherrill Fields; David Mayo; Robin Scott; Adrienne Scott; Ron Lawley; Morag Bellmaine; Steven Bisbey; Advanced Ability Center Candacraig; Advanced Ability Center East Grinstead; Church of the New Civilization; Harvey Haber; John Nelson; Vivian Zegel; Diana Reisdorf; and Richard Ofshe are respondents in this Court and were real parties in interest in the court below.

Petitioners in this Court and in the court of appeals are Church of Scientology International; Church of Scientology of California; Religious Technology Center; and Church of Spiritual Technology.

Real Parties In Interest herein have no parent companies, subsidiaries or affiliates to list pursuant to S.Ct. Rule 29.1.

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No. 91-1376

In the Supreme Court

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OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY INTERNATIONAL, et al.,
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UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, et al.,
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v.

DAVID MAYO, et al.,
Real Parties In Interest.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Real Parties In Interest, David Mayo, Church of the New Civilization, Harvey Haber, John Nelson, Vivian Zegel and Diana Reisdorf,[1] oppose the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed by the petitioners herein.

[1]Parties to consolidated cases *Religious Technology Center, Inc., et al. v. Robin Scott, et al.*, No. CV 85-711 (JMI), and *Religious Technology Center et al. v. Larry Wollersheim, et al.*, No. CV 85-7197 (JMI) (hereinafter collectively referenced to as "*Scott*").

OPINIONS BELOW

The order of the court of appeals denying the petitioners' petition for a writ of mandamus (1a-2a) is unreported. The denial of the petition for rehearing and suggestion for rehearing en banc (3a) is unreported. The November 22, 1991 order of the district court denying the motions to recuse (4a) is unreported; there is a transcript of the predicate hearing (8a-33a) during which the district court issued its oral decision.

JURISDICTION

The order of the court of appeals was filed on December 4, 1991 (1a). The denial of the petition for rehearing was filed on January 30, 1992 (3a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455(a) provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

28 U.S.C. § 455(b)(1) provides: "He shall also disqualify himself in the following circumstances: (1) where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings."

28 U.S.C. § 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

1. Petitioners' Real Motive For Filing Their Motion For Recusal

On August 12, 1991, the Honorable James M. Ideman denied petitioners' motion for review of the Honorable (Special Master) James G. Kolts' second Discovery Order, dated August 25, 1990, and ordered petitioners to comply with all outstanding discovery ordered by the Special Master. The district court noted at the time that:

> In the present case, Plaintiffs have been extremely evasive with respect to their discovery obligations. This [motion for review] appears to be yet another tactic utilized by Plaintiffs to delay the progress of this case which was first filed in 1985. Moreover, Plaintiffs are already in violation of several Court Orders which have directed that Plaintiffs respond to Defendants' pending discovery requests. In fact, discovery responses by Plaintiffs in this case have either been incomplete or inadequate.

(Order, dated 8/12/91) (6a-7a).

From that point forward, petitioners intensified their efforts to delay and obstruct the forward progress of this case, while they attempted to disqualify the district court and the Special Master. To that end, on September 24, 1991, petitioners filed a motion to recuse the district court and the Special Master, which was denied on October 25, 1991. Petitioners' petition for a writ of mandamus to the Ninth Circuit Court of Appeals was denied on December 4, 1991, as was the petition for rehearing and application for rehearing *en banc* on January 30, 1992.

In the interim, on January 22, 1992, real parties in interest filed a motion to dismiss petitioners' cases pursu-

ant to Rule 37 of the Federal Rules of Civil Procedure on the grounds that petitioners had willfully failed to comply with court discovery orders, destroyed and/or concealed evidence essential to real parties in interests' defense, and generally frustrated and obstructed the course of discovery, irreparably prejudicing real parties in interests' ability to obtain a fair trial and impeding the orderly administration of justice. That motion was granted by the Special Master on April 17, 1992.

2. The Alleged Bias Upon Which Petitioners' Motion Is Based In The *Scott* Case

Petitioners refer to two grounds upon which they seek recusal of the district court and Special Master in the *Scott* case. The alleged presence of a framed copy of the cover of a *Time* magazine edition which contains an article about Scientology hung somewhere in the staff's offices of the district court's chambers, and the district court's and Special Master's admonishing remarks in response to the discovery that petitioners were using a court reporting firm in the *Scott* case which, unknown to the district court or real parties in interest, was owned by Scientologists who were major financial contributors to the International Association of Scientologists' "war chest" used to fund, *inter alia,* petitioners' legal expenses.

Based upon these allegations, petitioners concluded that both the district court and the Special Master were biased and prejudiced against petitioners and filed a motion for recusal under *both* 28 U.S.C. § 455(a) and § 455(b)(1).[2]

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[2]Petitioners had previously sought to vacate the district court's referral to the Special Master which was denied. In their petition for a writ of mandamus to the Ninth Circuit Court of Appeals (also

3. The Order Denying Recusal

The motion seeking recusal was not heard by the district court judge presiding over the *Scott* case (Judge Ideman), but rather, pursuant to the General Orders of the Central District, by another district court judge (the Honorable J. Spencer Letts). After full briefing, Judge Letts conducted a hearing on October 25, 1991, and concluded, notwithstanding petitioners' inflammatory rhetoric and provocative conduct at the hearing, that there was no legitimate basis for recusal.[3] Subsequently, the court of appeals for the Ninth Circuit concluded that the district court's order denying recusal was not clearly erroneous and any alleged harm was correctable on appeal, and denied petitioners' petition for a writ of mandamus.

In so doing, the Ninth Circuit did not apply an aberrational approach "in conflict with nine other circuit courts." Rather, the opinion rendered was accurate and correct. Moreover, not only was the right result reached

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subsequently denied) the petitioners argued that the entire Central District's "policy" toward petitioners was suspect:

> "Plaintiffs are being done in by Judge Ideman, Special Master Kolts and the unwritten special rules for Scientology entities in the Central District of California."

(Plts.' Reply Memo., 5/22/90, at 25).

[3]At that hearing, petitioners' counsel engaged in what the district court characterized as "flagrant misconduct." Not only were United States Marshals called to escort one of the petitioners' counsel from the courtroom (before the Marshals arrived, however, counsel exited the courtroom), but also, one of petitioners' senior executives attempted to address the district court and, when he refused to stop after it was learned he was not an attorney, had to be removed from the courtroom by the Marshals (14a; 24a-25a).

in accordance with existing cases, but it was the fair result under the circumstances of this case.

Nonetheless, the petition now on file is predicated (at least initially) upon the proposition that:

> *Only* the Ninth Circuit now takes the view that the theoretical availability of post judgement appeal from the denial of a motion to recuse is sufficient grounds to deny a petition for mandamus. (Emphasis added).

(*See* Pet. at 15).

This so-called "split among the circuits" as to the availability of mandamus to review the trial court's denial of a recusal motion, however, is wholly illusory and has been invented by petitioners as part of a calculated effort to elevate petitioners' request for a writ of certiorari to one of national significance. However, contrary to petitioners' assertion, a review of applicable authorities reveals that the Ninth Circuit has for over the past forty years consistently and expressly recognized mandamus as an available remedy to review a trial court's denial of a recusal motion. To that end, the language of the judgment below plainly indicates petitioners' mandamus request to the court of appeals was fully reviewed and, thereafter, denied *on the merits* for failing to demonstrate valid grounds for the recusal of the trial court and Special Master before whom these consolidated cases have been pending for the past two and one half years.

Accordingly, in the alternative, the petitioners concede that the court of appeals may have afforded full mandamus review to the district court's denial of the recusal motion, but assert the standard of review afforded by the appellate court was also inconsistent with the recusal standards required by the Supreme Court and followed by

other circuits (*see* Pet. at 24); and that the district court initially failed to apply the correct legal standard when determining that recusal was inappropriate (*see* Pet. at 27).

Nevertheless, petitioners' "standard of review" and "erroneous legal standard" arguments, which, by their own terms, require them to jettison their initial "unavailability" argument, are equally specious. The Ninth Circuit's "clearly erroneous" test on review is applied in a flexible and time-tested manner. So, too, is the objective analysis test (*i.e.*, to justify recusal there must be a showing of bias or prejudice stemming from an extrajudicial source) employed by the district court in the underlying recusal motion. Both comply with long-standing precedent. As a result, petitioners' two-pronged attempt to create a split-among-the-circuits as an antecedent to the Supreme Court's exercise of its certiorari jurisdiction must fail.

REASONS FOR DENYING THE PETITION

I.

THERE IS NO SPLIT AMONG THE CIRCUITS; IN THE NINTH CIRCUIT MANDAMUS IS AVAILABLE IN APPROPRIATE CASES TO REVIEW THE DENIAL OF A MOTION FOR RECUSAL

A. The Availability Of Mandamus Review/The *Bauman* Test

As a starting point for their legal analysis, petitioners refer to the general availability of extraordinary writs (i.e., including mandamus) pursuant to the All Writs Statute, 28 U.S.C. § 1651, and the advent of the concept of

"supervisory mandamus" set forth in *LaBuy v. Howes Leather Company*, 352 U.S. 249 (1957).

Petitioners then argue that the failure of the trial judge to recuse himself when "his impartiality might reasonably be questioned," pursuant to 28 U.S.C. § 455(a), constitutes "a clear abuse of discretion and conduct amounting to a usurpation of judicial power." (*See* Pet. at 14). In such circumstances, petitioners submit that the only effective and meaningful way to prevent damage to the judicial system and to the litigants from an "improperly denied" recusal motion is by providing immediate and plenary review by means of writ of mandamus. Finally, petitioners attribute the denial of their request for mandamus relief herein "primarily, if not exclusively on the ground that mandamus review is unavailable" within the Ninth Circuit to review a district court's denial of a recusal motion. (See Pet. at 15, citing *In re Cement Antitrust Litigation (MDL 296)*, 688 F.2d 1297 (9th Cir. 1982)).

However, mandamus review is not unavailable. To reach this conclusion it is necessary only to review the general availability of extraordinary writs and the nature of the showing required to merit issuance of extraordinary relief via mandamus. In *Bauman v. United States District Court*, 557 F.2d 650, 653 (9th Cir. 1977) the appellate court recognized that one of the most significant challenges then facing the federal appellate courts centered on the proper use of the wide-ranging power to issue extraordinary writs pursuant to the All Writs Statute and/or the use of "supervisory mandamus" to review proceedings before the trial courts.[4]

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[4]Additionally, the *Bauman* court specifically noted the danger of unprincipled use of the review mechanisms inherent in the consideration of extraordinary writs (e.g., subversion of the policies underlying the finality rule, 28 U.S.C. § 1291, or the limited congressional

Cognizant of the policy considerations militating in favor of appellate court restraint as necessary to promote a harmonious relationship between the federal appellate and trial courts (see fn.4, *supra*), the *Bauman* court looked to prior decisions of this Court for guidance. In *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976), this Court held that the *issuance* of writs of mandamus to a lower court was essentially a drastic remedy and therefore properly used only in *extraordinary situations:*

> to confine an inferior court to lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so. *Only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy.* (Emphasis added).

Based on these important policy considerations, the Ninth Circuit in *Bauman, supra,* 577 F.2d at 654-655, proceeded to formulate five specific guidelines to be considered in determining the appropriateness of the issuance of general mandamus relief:

> (1) The petitioner (party seeking the writ) has no other adequate means, such as a direct appeal, to obtain the relief he or she desires (citing, *inter alia, Kerr, supra*).
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is

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scheme governing interlocutory appeals, 28 U.S.C. § 1292, as well as the delicate relationship between federal trial and appellate courts predicated on mutual respect of this conduct of their respective proceedings). In particular, the court identified a pressing need to "*formulate objective principles to guide the exercise of their section 1651 power.*" (Emphasis added). *Bauman, supra,* 577 F.2d at 653.

closely related to the first) (citing *Arthur Young & Co. v. United States District Court*, 549 F.2d 686, 692 (9th Cir. 1977)).

(3) The district court's order is clearly erroneous as a matter of law (citing, *inter alia, Arthur Young, supra*).

(4) The district court's order is an oft-repeated error or manifests a persistent disregard of federal rules (citing, *inter alia, LaBuy v. Howes Leather Company, supra*).

(5) The district court's order raises new and important problems or issues of law of first impression (citing, *inter alia, Schlagenhauf v. Holder*, 379 U.S. 104 (1964)).

Although the enumerated guidelines were formulated as helpful to the exercise of judicial discretion inherent in granting or denying requests for mandamus relief, the *Bauman* court cautioned that the facts in any particular case would raise questions of degree (as to the extent a particular factor is present), and rarely, if ever, would a case arise where all the guidelines point in the same direction or even when each guideline is relevant or applicable. Thus, the considerations are cumulative and proper consideration will often require a balancing of conflicting indicators. *See Bauman, supra*, 577 F.2d at 655; *see also, In re Cement, supra*, 688 F.2d at 1301.

With this in mind, petitioners' argument as to the ostensible unavailability of mandamus to review the denial of a recusal motion is wide of the mark in no less than three fundamental respects. First, a review of the language and the holding in *In re Cement, supra* (the only Ninth Circuit authority cited in petitioners' proffered legal analysis) reveals that in that case the Ninth Circuit

specifically *approved* mandamus as a proper remedy to review the *granting* of a recusal motion and did not hold, as asserted by petitioners, that mandamus review is unavailable where the recusal motion is *denied*. Secondly, a review of applicable Ninth Circuit authorities, decided both before and after *In re Cement*, undeniably establishes the general availability of mandamus to review the *denial* of a recusal motion and/or motions to disqualify the trial court on the grounds of prejudice and/or bias. Thirdly, even as petitioners themselves must concede, the specific language of the Ninth Circuit's judgment herein indicates the petition for mandamus was both fully considered and, thereafter, denied *on the merits*.

B. The Application Of The *Bauman* Test In The Context Of Mandamus Review Of Recusal Motions

1. The *In Re Cement* Decision

Initially, petitioners suggest the *holding* of *In re Cement, supra*, stands for the proposition that "an order *denying* a motion for disqualification is reviewable on appeal after final judgment" thereby "rendering the exercise of [Ninth Circuit] . . . mandamus authority inappropriate" (emphasis supplied). (Pet., at 16). Petitioners misconstrue *In re Cement* in several respects.

First and foremost, petitioners' argument runs afoul of the actual holding of the case. *In re Cement* considered the review of a trial court's *granting* of a motion for recusal and held review of the order by mandamus was *proper*.[5] As a result, the language from which petitioners

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[5]*In re Cement* is inapposite to petitioners' argument to the extent the court did *not* consider a trial court's *denial of a recusal motion*. To the contrary, the trial court *granted* the recusal motion when it

strain to construct their theory as to the unavailability of mandamus for review of a *denial* of a recusal motion is clearly *dicta.*[6] Not only does the language quoted by petitioners *not* represent the *holding* of the court as petitioners inaccurately indicate (*see,* Pet., at 15: "the court *held* in . . .") but rather, consists of an observation about the decisions of *other* circuits. (*In re Cement, supra,* 688 F.2d at 1302).

Setting aside petitioners' misinterpretation of the appellate court's holding, it is clear the *In re Cement* court carefully applied the detailed factor-by-factor review of the mandamus petition pursuant to the analysis suggested by *Bauman* and, thereafter, determined the grant of mandamus review was *proper.* (In other words, the petition was considered *on the merits*).[7]

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appeared that the trial judge's wife held a financial interest which, in the context of the litigation, could be considered to raise the appearance of impropriety. The adverse party, seeking to retain the trial judge, initially sought review of the order *granting* recusal by interlocutory appeal, and upon its denial, by means of a writ of mandamus.

[6]In the words of the court:

> "While it is true that an order *denying* a motion for recusal might at some later time become the subject of the appeal, it would be contrary to the interest of the orderly judicial administration to delay resolution of the important question before us in order to await the occurrence of such a possibility." (Emphasis added).

In re Cement, supra, 688 F.2d at 1305.

[7]In considering the first two *Bauman* criteria, the court noted it had previously denied petitioner's request to review the order of recusal pursuant to appeals under 28 U.S.C. § 1291 (direct appeal of collateral order), and 28 U.S.C. § 1292(b) (discretionary interlocutory appeals). *In re Cement, supra,* 688 F.2d at 1301.

The detailed review of the *Bauman* factors and the appellate court's ultimate granting of mandamus relief in *In re Cement* belie petitioners' assertion that *In re Cement* precludes the availability of mandamus in the context of the denial of a recusal motion. Petitioners' efforts to limit such relief only to the granting of recusal is simply unavailing especially when numerous other Ninth Circuit cases have granted mandamus to review a *denial* of a recusal motion.

2. Other Ninth Circuit Decisions Involving Mandamus Review Of Denial Of Recusal Motions

Petitioners' arguments notwithstanding, where the circumstances of an individual case so require, the Ninth Circuit has expressly and unequivocally authorized use of mandamus relief to review *denial of recusal* motions before the trial court:

> Parties aggrieved by the trial court's refusal to order disqualification are not wholly without an interlocutory remedy. In the exceptional case, where the issue of disqualification appears to be a significant one, the court may consider the motion to disqualify upon a petition for a writ of mandamus.

United States v. State of Washington, 537 F.2d 1121 (9th Cir. 1978). *See also, Gladstein v. McLaughlin*, 230 F.2d 762 (9th Cir. 1955) (writ of mandamus proper remedy for asserting trial judge's personal bias and prejudice against attorney practicing before Circuit); *Connelly v. U.S. District Court*, 191 F.2d 692 (9th Cir. 1951) (writ of mandamus proper remedy to assert prejudice of trial court as to members of the Communist Party); *United States v. Conforte*, 457 F.Supp. 641, 651 (1978), *aff'd*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980) (28 U.S.C. § 455 motions for recusal

may be "... asserted by a party to an action by means of a motion in the trial court, *by mandamus,* or on appeal" (emphasis supplied)).

Petitioners' attempt to conjure up a split-among-the-circuits as to the availability of mandamus review of the denial of recusal motion is not only unsupported by case law, but rather, is expressly *refuted* by the repeated holdings of the Ninth Circuit during the past half-century.

3. The Order Denying Mandamus Herein

The judgment of the Ninth Circuit herein provides as follows:

> While reasonable minds might draw different inferences from the facts alleged in the motion for recusal, the court finds that the District Court's order denying recusal was not clearly erroneous, and further that the harm alleged in the petition is correctable on appeal. *See, Bauman v. United States District Court,* 557 F.2d 650 (9th Cir. 1977); *In re Cement Antitrust (MDL 296),* 699 [sic] F.2d 1297, 1302 [9th Cir. 1982]. Accordingly, the petition for writ of mandamus is denied. The motion to stay is denied as moot (1a-2a).

Even as petitioners themselves are forced to concede (see Pet., at 24, "Assuming the Court Below Engaged in Substantive Review ..."), a reasonable interpretation of the appellate court's language is that the petition for mandamus was considered *on the merits,* and was denied as a result of petitioners' failure to demonstrate the trial court's order was clearly erroneous and that any harm alleged in the petition could not be adequately asserted

on appeal, pursuant to the *Bauman* analysis. (*See also*, Pet., at 15, fn.13).[8]

II.

IN THE CONTEXT OF A PETITION FOR WRIT OF MANDAMUS, THE COURT OF APPEALS PROPERLY APPLIED AS ONE OF ITS GUIDELINES A "CLEARLY ERRONEOUS" STANDARD OF REVIEW OF THE DISTRICT COURT'S ORDER DENYING RECUSAL

Confronted with Ninth Circuit precedent directly authorizing review of the denial of a recusal motion pursuant to a petition for writ of mandamus, *and* the express language of the Ninth Circuit's order demonstrating that such a review was afforded to the petitioners herein, petitioners proceed with a fall-back position. Thus, assuming the Ninth Circuit *did* reach the merits of the petition for mandamus herein (and, *a fortiori*, the petitioners' first argument was baseless), petitioners also complain the "standard" utilized by the Ninth Circuit to review a trial court's denial of a recusal motion is, once again, inconsistent with this Court's decisions and the standards of other circuits (Pet., at 24).[9] As with the

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[8]Given the demonstrable availability of mandamus review within the Ninth Circuit as to orders denying recusal of the trial court and the lack of any apparent conflicts with such relief afforded by the other circuits, Respondents will not further comment on petitioners' lengthy, but entirely unnecessary, survey of this area of the law within the other circuits.

[9]The focus of petitioners' second argument seems to be that the *appellate court* applied an erroneous standard to the trial court's denial of the underlying recusal motion as opposed to the assertion the trial judge to whom the recusal motion was referred failed to apply the proper standard *initially*.

alleged "unavailability" argument, petitioners' attribution of a special recusal review standard in the Ninth Circuit is the byproduct of their failure to cite applicable authority, rather than a demonstrable split-of-authority among the various circuits.

A writ of mandamus is a drastic remedy available only in extraordinary situations. *Kerr v. United States, supra.* A party seeking such relief carries the heavy burden of demonstrating that he has "no other adequate means to attain the relief he desires" and that his right to such relief is "clear and undisputable." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980).

Courts have demonstrated a reluctance to issue writs of mandamus lest it be exploited to "subvert the policies underlying the finality rule 28 U.S.C. § 1291, or the carefully limited congressional scheme governing interlocutory appeals, 28 U.S.C. § 1292." *Bauman, supra*, 557 F.2d at 653.

In determining whether mandamus review was available to petitioners for the denial of a recusal motion, the court of appeals applied the multi-factor *Bauman* test. If nothing else, the *Bauman* test is characterized by its intended flexibility. No one factor is controlling, not all factors are present in every case, and a proper disposition will often require a balancing of conflicting indicators. *Id.* at 655.

In the case below, one of the factors cited by the court of appeals was whether the district court's order was "clearly erroneous." The requirement is based upon the court of appeals' recognition of its role in not interfering with the district court's control over litigation pending before it:

> In the normal run of cases, it would be counter-productive for appellate courts to interfere when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction,' *Schlagenhauf*, 379 U.S. at 112, 85 S.Ct. at 239 (quoting *Parr v. United States*, 351 U.S. 513, 520, 76 S.Ct. 912, 917, 100 L.Ed. 1377 (1956)).

In re Cement, supra, 688 F.2d at 1307. Nevertheless, if other factors are present, such as "a question of law of first impression, the resolution of which would have a substantial effect on the orderly and efficient administration of the courts" the court of appeals "might issue [a] writ even were we simply to conclude that the district court was in error." *Id.*

Accordingly, had the court of appeals determined that the district court's order denying recusal otherwise justified the extraordinary application of mandamus review, the requirement of a "clearly erroneous" order would not have prevented it from doing so.

However, the court of appeals did not conclude that departure from this general guideline was appropriate. Petitioners, nevertheless, characterize the court of appeals reliance on this standard of review as "idiosyncratic" and "insurmountable." As just seen, it is not insurmountable, and as shall now be seen, neither is it idiosyncratic.

In *In re Benedictin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984) the court of appeals for the Sixth Circuit approvingly cited and applied the *Bauman* analysis and granted a writ of mandamus in response to a district court order it found to be "clearly erroneous." In that decision, the court of appeals noted:

> The guidelines outlined in *Bauman* are based on an extensive review of applicable Supreme Court precedent and Ninth Circuit case law. Although the Supreme Court has considered the proper use of the writ of mandamus on two occasions since *Bauman*, *Allied Chemical Corp. v. Daiflon Inc.*, 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980); *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978), neither of those cases suggest that the guidelines utilized in *Bauman* are no longer appropriate.

In Re Benedictin, supra, 749 F.2d at 303, fn.7.[10]

The application, among others, of the "clearly erroneous" guideline to the district court's order denying recusal is not only appropriate, it does nothing to detract from the separate standard employed by the district court when it initially determined that the district court judge's impartiality could not be reasonably questioned pursuant to 28 U.S.C. § 455(a). However, petitioners improperly seek to merge these distinct concepts.

The court of appeals stated that "while reasonable minds might draw different inferences from the facts alleged in the motion for recusal, the court finds that the district court's order denying recusal was not clearly erroneous . . ." (1a). Petitioners then disingenuously

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[10]The Ninth Circuit will characterize a ruling as "clearly erroneous" only if it is "firmly convinced" that the district court's ruling on a question of law was incorrect. A comparable standard is used by the Second Circuit when it applies a "firm conviction" test. *See e.g., In re IBM*, 687 F.2d 591, 600 (2d Cir. 1982). The Seventh Circuit employs a comparable "clear error" test. *Maloney v. Plunkett*, 854 F.2d 152, 154 (7th Cir. 1988). The Eleventh Circuit utilizes a "clear error" of judgment standard. *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989).

compare the court of appeals decision with the statutory language of 28 U.S.C. § 455(a) that a judge must disqualify himself if "his impartiality might reasonably be questioned."

While 28 U.S.C. § 455(a) clearly refers to "impartiality" being "reasonably" questioned, the court of appeals' remarks are directed to whether "reasonable" minds might differ as to "inferences" to be drawn from factual allegations. The court of appeals did not say that reasonable minds might draw different inferences as to whether the district court judge was *impartial* or not.

In *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981) the court of appeals for the First Circuit focused on the range of discretion properly available to the district court when assessing whether a reasonable person would doubt a judge's impartiality:

> We recognize that the analysis of allegations, the balancing of policies, and the resulting decision whether to disqualify are in the first instance committed to the district judge. *And, since in many cases reasonable deciders may disagree, the district judge is allowed a range of discretion.* The appellate court, therefore, must ask itself not whether it would have decided as did the trial court, but whether that decision cannot be defended as a rational conclusion supported by reasonable reading of the record. Moreover, in this case, which comes to us by a petition for mandamus, the party seeking the writ of mandamus must show a 'clear and indisputable' right to relief.' (Citations omitted, emphasis supplied).

Accord, In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1312 (2d Cir. 1988), *cert. denied, sub nom, Milken v.*

S.E.C., 490 U.S. 1102 (1989). This is precisely the approach taken by the court of appeals in this case.

The court of appeals concluded that the district court was not clearly erroneous when it *declined* to hold that the facts alleged gave rise to a situation where "a reasonable person with knowledge of all the facts would conclude that the judges impartiality might reasonably be questioned." *United States v. Studley,* 783 F.2d 934, 939 (9th Cir. 1986). To the contrary, the district court found in each case that the allegations did not support a showing of extrajudicial bias (see district court's comments regarding allegations that Judge Ideman accused *both* parties in the *Aznaran* case of flagrant misconduct, disregard of the Court's orders and outrageous litigation tactics, (25a-26a); that Judge Ideman concluded that the *undisclosed* use of a court reporting service owned by Scientologists who were substantial financial contributors to petitioners' International Association of Scientologists in the *Scott* case required "looking into" (26a-27a); and the framed *Time* magazine cover alleged to be hanging on a wall somewhere in the court's staff's area ("I simply don't think *anybody* can draw *any inference* that there is some extra-judicial bias for the fact that is there, and I don't make that inference" (emphasis added) (27a-28a)).[11]

The district court did not equivocate in holding that no one could draw an inference of bias based on the record

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[11]References to the district court's conduct in *other* cases are not appropriate grounds for recusal in *this* case. *Mayes v. Leipziger*, 729 F.2d 605, 607 (9th Cir. 1984) (A judge's prior adverse ruling against a party in one case is not sufficient grounds for recusal of that judge by the same party on a second case). For that reason real parties in interest in this case leave it to the real parties in interest in the other cases involved in this petition to address the claims made by petitioners in those cases.

before it. While the court of appeals conceded that different *inferences* could be drawn from the factual allegations, it did not conclude that the district court was clearly erroneous in holding that no inference could be drawn giving rise to a reasonable person concluding that the district court judge's impartiality might reasonably be questioned. The same was true in *In re Drexel, supra*, 861 F.2d at 1313.

> We disagree with our dissenting colleague's statement that recusal based on an appearance of impropriety under § 455(a) 'requires us to judge the situation from the viewpoint of the reasonable person, and not from a purely legalistic perspective.' Like all legal issues, judges determine appearance of impropriety — not by considering what a straw poll of the only partly informed man-in-the-street would show — but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.

Moreover, in matters involving recusal, this Court has said:

> In considering whether a remedy is appropriate, we do well to bear in mind that in many cases — and this is just an example — the Court of Appeals is in a better position to evaluate the significance of a violation than is this Court. Its judgement as to the proper remedy should thus be afforded over due consideration.

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988).

III.

THE DISTRICT COURT'S ORDER HOLDING THAT THE PETITIONERS HAD FAILED TO ESTABLISH THAT THE DISTRICT COURT JUDGE'S IMPARTIALITY MIGHT REASONABLY BE QUESTIONED OR THAT HE HAD A PERSONAL BIAS OR PREJUDICE CONCERNING PETITIONERS WAS NOT CLEARLY ERRONEOUS

Petitioners stress that the district court erred in relying upon *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). *Grinnell* involved a motion for disqualification under 28 U.S.C. § 144 on the ground of personal bias and prejudice. In such a case the alleged bias and prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Id.* at 583. The district court's reliance here upon *Grinnell* was required by the nature of petitioners' accusations. Petitioners did not rely on the general terms of 28 U.S.C. § 455(a) that the district court judge's "impartiality might reasonably be questioned;" but rather, on the specific allegation that the district court judge's impartiality might reasonably be questioned *because* he allegedly had "a personal bias or prejudice" towards them requiring recusal under 28 U.S.C. § 455(b)(1).

Courts in the Ninth and other Circuits agree that: "decisions interpreting section 144 are also controlling in the interpretation of the bias and prejudice language in section 455(b)(1)." *See, United States v. Conforte*, 624 F.2d 869, 880 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980) and cases set forth therein. Moreover, § 455(b)(1) has been interpreted as providing a specific example of the kind of situation which might question a judge's impartiality under § 455(a). Thus, when the sole

ground for recusal is alleged bias or prejudice, an independent ground for recusal under 28 U.S.C. 455(a) is not created. Instead, the single question remains whether the district court erred in refusing to order recusal for personal bias or prejudice pursuant to either section 455(a), or (b)(1), with the same substantive standard applied to both sections. In that regard, recusal for alleged bias or prejudice is required only if such bias or prejudice "is directed against a party and stems from an extrajudicial source." *United States v. Sibla*, 624 F.2d 864, 869 (9th Cir. 1980).[12]

Pursuant to these principles, the district court was correct in applying the standard set forth in *Grinnell* in analyzing petitioners' bias and prejudice claim brought under § 455(a) and § 455(b)(1).[13] Thereafter, once hav-

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[12]An exception to the rule that prejudice under § 455 (a) must stem from an extrajudicial source is when the "judge's remarks in a judicial context manifest such pervasive bias and prejudice that it constitutes bias against a party." *United States v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988), *cert. denied*, 488 U.S. 1040 (1989). In that regard, the extent of bias or prejudice necessary would be "an attitude or state of mind that belies an aversion or hostility of a level or degree that a fair minded person could not entirely set aside when judging certain persons or causes. It is an animus more active and deep-rooted than an attitude of disapproval toward certain persons because of their known conduct . . ." *United States v. Conforte*, *supra*, 624 F.2d at 881. No such finding was made in this case.

[13]". . . [S]ubsection (a) is designed to cover contingencies not foreseen by the draftsmen, who set out specific grounds for disqualification under subsection (b). This interpretation is consistent with the legislative history, which describes (a) as a 'general, or catch-all provision.' H. Rep. No. 1453, 93rd Cong., 2d Sess, *reprinted in* [1974] U.S. Code Cong Admin. News 6351, 6354. Subsection (a) was described as establishing an objective standard which required disqualification 'if there is a reasonable factual bias for doubting the judge's impartiality.' *Id.* at 6355. Subsection (b) on the other hand,

ing concluded that there was no bias or prejudice pursuant to § 455(b)(1) disqualification, and thereby eliminating the sole basis upon which petitioners' § 455(a) disqualification claim was based, the district court properly denied petitioners' motion for recusal.

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was addressed to specific instances 'which are in addition to the general standards set-up in section (a)' *Id.* When these specific instances are present, the inquiry must proceed under subsection (b), rather than subsection (a) . . ." *United States v. Conforte, supra,* 624 F.2d at 880-881.

CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari should be denied.

Dated: April 23, 1992 Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-70659
D.C. No. CV-88-1786-JMI
(Central California)
December 4, 1991

CHURCH OF SCIENTOLOGY INTERNATIONAL, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

VICKI J. AZNARAN, *et al.*,
Real Parties
In Interest.

Before:

FARRIS, POOLE AND NORRIS,
Circuit Judges

ORDER

While reasonable minds might draw different inferences from the facts alleged in the motion for recusal, the court finds that the district court's order denying recusal was not clearly erroneous, and further that the harm alleged in the petition is correctable on appeal. *See Bauman v. United States Dist. Ct.*, 557 F.2d 650 (9th Cir.

1977); *In re Cement Antitrust Litigation (MDL 296)*, 699 F.2d 1297, 1302 (9th Cir. 1982). Accordingly, the petition for writ of mandamus is denied. The motion to stay is denied as moot.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-70659
D.C. No. CV-88-1786-JMI
(Central California)
January 30, 1992

CHURCH OF SCIENTOLOGY INTERNATIONAL, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

VICKI J. AZNARAN, *et al.*,
Real Parties
In Interest.

Before:

FARRIS, POOLE AND NORRIS,
Circuit Judges

ORDER

The petition for rehearing and suggestion for en banc review are denied. No further filings will be accepted in this closed docket number.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 88-1786 JMI
November 22, 1991

VICKI J. AZNARAN AND RICHARD N. AZNARAN,
Plaintiffs,

v.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, *et al.*,
Defendants.

ORDER DENYING MOTION TO RECUSE THE HONORABLE JUDGE JAMES M. IDEMAN

The Motion of defendants CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al., to recuse the Honorable Judge James M. Ideman came on for hearing regularly on October 25, 1991.

Having reviewed the papers filed in connection with this matter, having heard oral argument, and being fully apprised of the relevant facts and law,

IT IS HEREBY ORDERED that the Motion of defendants CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al., is DENIED.

IT IS SO ORDERED.

DATED: November 22, 1991

J. Spencer Letts
United States
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER, *et al.*,
Plaintiff(s),

v.

ROBIN SCOTT, *et al.*,
Defendant(s).

RELIGIOUS TECHNOLOGY CENTER, *et al.*,
Plaintiffs,

v.

LARRY WOLLERSHEIM, *et al.*,
Defendants.

AND RELATED COUNTERCLAIMS

ORDER DENYING PLAINTIFFS' MOTION FOR STAY

ORDER DENYING PLAINTIFFS' MOTION FOR REVIEW OF THE SPECIAL MASTER'S DISCOVERY ORDER DATED 7/25/90

IT IS HEREBY ORDERED:

1. Plaintiffs RELIGIOUS TECHNOLOGY CENTER, et al.'s (hereinafter "Plaintiffs") motion for a stay and suspension of discovery and a stay of the objections to the Special Master's Discovery Order pending adjudication of motions for partial summary judgment is hereby DENIED.

2. Plaintiffs' motion for review of the Special Master's Discovery Order dated 7/25/90 is hereby DENIED.

3. Plaintiffs contend that discovery on the antitrust and authorship issues should be stayed and suspended until the summary judgment motions addressing the claims and defenses regarding those issues are resolved. They argue that discovery on those issues has been extensive and intrusive and promises to continue to be so. Plaintiffs assert that compliance with discovery requests and discovery orders regarding those issues now would be wasteful if summary judgment motions are granted and they claim that if the summary judgment motions are denied, the delay a stay would occasion would be minimal and discovery could continue from that point.

4. As to the motion for review of the Special Master's Order, Plaintiffs contend that Defendants have failed to demonstrate that the documents sought are relevant, that Defendants cannot get financial discovery for punitive damage claims, that Plaintiffs' financial records are specifically protected by California law, and that the Special Master's Order which permits discovery of financial records because of their alleged relevancy to Defendant's antitrust claims is not supported by fact or law.

In the present case, Plaintiffs have been extremely evasive with respect to their discovery obligations. This appears to be yet another tactic utilized by Plaintiffs to delay the progress of this case which was first filed in 1985. Moreover, Plaintiffs are already in violation of several Court Orders which have directed that Plaintiffs respond to Defendants' pending discovery requests. In fact, discovery responses by Plaintiffs in this case have either been incomplete or inadequate. In light of the foregoing, the Court hereby DENIES Plaintiffs' motion for a stay and the Court also hereby DENIES Plaintiffs'

application for review of the Special Master's Discovery Order dated 7/25/90 and hereby ORDERS the parties to comply with the discovery ordered by the Special Master. IT IS SO ORDERED.

DATED: August 12, 1991

JAMES M. IDEMAN

JAMES M. IDEMAN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE J. SPENCER LETTS,
PRESIDING
UNITED STATES DISTRICT COURT JUDGE

CV-90-2042-JMI

CHURCH OF SCIENTOLOGY, *etc., et al.*,
Plaintiffs,
v.
UNITED STATES OF AMERICA, *etc., et al.*,
Defendants.

TRANSCRIPT OF PROCEEDINGS
Friday, October 25, 1991
Los Angeles, California

Motion to Recuse Judge Ideman

Terry Kramer, CVR
Official Reporter
United States District Court
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For the United States of American:

Lourdes Baird
United States Attorney
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BY: Richard Stack
Assistant United States Attorney

Los Angeles, California, Friday, October 25, 1991

2:10 o'clock p.m.

THE CLERK: CV-90-2042-JMI, Church of Scientology versus United States of America; CV-85-711-JMI, Religious Technology Center versus Robin Scott; CV-85-7197-JMI, Religious Technology Center versus Larry Wollersheim et al.; and CV-88-1786-JMI, Vicki Aznaran versus Church of Scientology, et al.

MR. COOLEY: Earle C. Cooley for the moving parties, Your Honor.

MR. DRESCHER: William Drescher for the moving parties.

MR. MOXON: Kendrick Moxon, Your Honor, also for the moving parties.

MR. FAGELBAUM: Jerry Fagelbaum, Your Honor, representing defendant and opposing party David Mayo and Church of the New Civilization.

MR. BRIGHT: Gary Bright representing all defendants and counterclaimants.

MR. ELSTEAD: And John Elstead for Richard and Vicki Aznaran.

MR. STACK: Your Honor, Richard Stack, Assistant United States Attorney, representing the United States in opposition to the motion in the 90-2042 case.

THE COURT: I'm not sure that there is anything to be added at a hearing, so I think the first question is, does anybody have anything to add to the papers they've already filed.

The second question of course, if so, why?

MR. COOLEY: I'm sorry, Your Honor; I didn't hear you.

THE COURT: The second question of course, if so, why, but if anybody does, I will expect it to be in addition. I can read and have read. If there is anything to be added, I would hear it.

MR. COOLEY: Well, I'm not entirely certain that it's in addition to, but I'd like to highlight some of the aspects of —

THE COURT: You see, if I let you highlight aspects, everybody else is going to highlight aspects, and we'll have a very long hearing to see if I've been able to understand what I've read, which right now I have no reason to believe that I didn't understand what I read.

MR. COOLEY: Well, I'd like to address that *Time* magazine article, Your Honor, because I think it's crucial.

THE COURT: No, it's not.

MR. COOLEY: And I think in and of itself, it mandates —

THE COURT: Sir?

MR. COOLEY: — recusal.

THE COURT: I'm sorry.

MR. COOLEY: Am I not to be heard; is that the position that I'm in?

THE COURT: If you're going to tell me things that you've already told me, that's the answer, you're not going to be heard.

MR. COOLEY: What I'm here to tell you is that — the tacking of that article alone on the wall of Judge Ideman's Chambers mandates recusal.

THE COURT: I understand your position.

MR. COOLEY: I don't know if you've had the opportunity to read the article itself.

THE COURT: No, of course not.

MR. COOLEY: Well, the article itself —

THE COURT: Stop; that is enough. I will not hear it. If you understand English, you should now understand that I'm not going to hear that.

MR. COOLEY: Why?

THE COURT: Becuase you have told me more about that article already than I wish to know.

MR. COOLEY: Well, It seems —

THE COURT: You don't know, and I don't know, who hung that picture, why they hung it, or what it meant. It's a picture of a cover of a magazine.

I don't know why it is there, but you may not draw inferences about me from anything you can find sitting in my chambers.

MR. COOLEY: I respectfully submit that that simply is not so.

THE COURT: But that is going to be a matter that is going to be up to the judge, and I don't agree with you, so I don't want to hear what's in the article.

The article is not pasted on his wall. The *Time* magazine cover is someplace in his chambers, I take it. My suspicion is that if it were in his office, you would have told me that, so I suspect it's not there.

MR. COOLEY: It's in his — the working part —

THE COURT: You have told me —

MR. COOLEY: — of his chambers —

THE COURT: Wait a minute; stop.

MR. COOLEY: He must —

THE COURT: Stop.

I will have a marshal escort you out of here if you don't stop when I tell you to stop.

MR. COOLEY: Well, I am not going to. If you want the marshal to escort me out —

THE COURT: Ms. Webb, will you call the marshal.

(Mr. Cooley exited the courtroom.)

THE COURT: Does anybody have anything to add to their papers?

MR. DRESCHER: No, Your Honor, we don't. We believe the showing has been made.

THE COURT: Thank you.

Does any defendant have anything to add to their papers?

MR. STACK: I certainly do, Your Honor.

THE COURT: Make it an addition. I'm going to be just as difficult with you as I was with him. It will be in addition.

MR. STACK: Yes, it is an addition, Your Honor.

First of all, as far as the alleged evidence of the *Time* magazine hanging in Judge Ideman's Chambers, defendant objects to that as hearsay. There is no support whatsoever in the plaintiffs' reply for this proposition.

They refer to a declaration of a Ms. Ava Chromoy, who advised the personnel director of Bowles & Moxon that

she had delivered papers to Judge Ideman's Court, and that she had observed the *Time* magazine article in his chambers at that time.

First of all, that's hearsay within hearsay, whatever Ms. Chromoy advised the personnel director of Bowles & Moxon.

Secondly, I don't see a declaration of the personnel director, even if the Court would entertain that evidence.

Thirdly, an exhibit to the plaintiffs' reply refers to this declaration of Ms. Ava Chromoy that was attached as an exhibit to the recusal motion in the Aznaran case, and that declaration itself is not attached to the reply in case No. 90-2042.

I'm objecting on the grounds that there's no evidence before the Court to conclude that a picture of the *Time* magazine article is in Judge Ideman's Chambers.

I haven't seen the papers in —

THE COURT: To be candid, as I sit here, I don't know that I'm bound by purely evidentiary things if I were to choose to consider them.

If believed there was anything to be considered just by the existence of that picture, assuming it's true for the moment, I guess I'd have to consider that.

Does anybody choose to instruct me?

I don't think I'm limited to the Rules of Evidence in the things I would consider.

MR. STACK: I believe you can consider, but of course if it's hearsay, it's less reliable.

THE COURT: I would assume, because it's so easily checked, that it must be true; if it isn't true, it occurs to

me the defendants would probably find out it's not true and tell me that.

Without being difficult about it, different things capture different people's opinions, and people have things they like, things that tickle their sense of humor. There are a lot of reasons why people wear the things they wear, display the things they display.

I just simply think it's inappropriate to draw inferences about any individual who works in those chambers because there is something hanging on the wall in those chambers that I don't know how they got there. I can't get there from here, but if I thought it was relevant, I would think it was appropriate to consider it.

MR. STACK: There's one other point in the plaintiffs' reply that I would like to address also, Your Honor, and that pertains to an alleged relationship, social and personal relationship between one of the defendants that Charles Jeglikowski —

MR. ELSTEAD: I'm sorry to interrupt.

Can I ask a favor, that rather than refer — because there's a mixture of defendants and plaintifs on either side — if we could refer to the parties by name, just for purposes of the record?

THE COURT: Sure, I don't see why we can't do that or why we shouldn't do that.

MR. STACK: Okay.

With respect to the Church of Scientology, California versus Sandra Baker case, one of the defendants in the case is Charles Jeglikowski. He was named as a defendant in the plaintiffs' first amended complaint, which I believe was filed in early 1991.

There's a couple of things. I don't think his personal relationship is relevant, first of all, because he's not a proper defendant in this case.

He is an IRS attorney, and under the rule of Frye versus Milerogno (phonetic), a recently decided Ninth Circuit case, such tax attorneys as Mr. Jeglikowski have absolute immunity, and he's not a proper party defendant to begin with.

And the government did file a motion to dismiss Defendant Jeglikowski. I don't have the exact date. I believe it was —

THE COURT: Has it been granted?

MR. STACK: — in June.

No, it is still pending, Your Honor. It has been fully submitted, but it is pending.

Secondly, the fact that Mr. Jeglikowski and Judge Ideman allegedly worked in the same units of the Army. I don't see how it's relevant that they know each other. I believe the main point is that Mr. Jeglikowski should not even be in this case.

You know, I'm not sure why the plaintiffs —

THE COURT: I can't even address that.

All I can address — and the reason we got to where we are — again, the wisdom of having a hearing is I think more in doubt now than it was — the papers, as filed, in my judgment, required a response, so there is a response now.

I think the papers raised the questions that they intended to raise adequately. In my judgment you could not rule on them without some response. I've now seen a response.

I didn't want to, in a case of as much apparent sentiment as this case, simply rule without giving anybody an opportunity to be there, so I wanted to see if there was anything anybody wanted to add.

My expectation, frankly — but maybe not an expectation of great value — that probably, since the *Time* magazine article business came in a reply brief, the defendants might want to address it.

I thought it was possible that the Church of Scientology might have something that's either new or different, but I had no great expectation of that.

The *Time* magazine thing, while I rather thought that the defendants might want to address it, it didn't seem then and doesn't seem now anything you can draw any inferences from.

The reason for having a hearing is simply to have everybody there for a last clear chance, but I thought the papers spoke for themselves when filed, and the opposition spoke for themselves when filed.

I'm prepared to rule unless there is something somebody has that's new that should be added to it.

MR. STACK: I have nothing further to say, Your Honor.

MR. MOXON: I would like to briefly respond to the Court's question. The Court actually had a pending question with respect to that *Time* magazine article which I think we can clarify here as to why there's some significance.

THE COURT: I don't think I asked that question; I'm sorry.

MR. MOXON: The question I would respond to, Your Honor, is why you believed that was relevant, why you —

THE COURT: No, I didn't; I'm sorry.

What I have said consistently — and I haven't asked you, and there seems to be a high degree of desire to say on the record things about that article, and I don't choose to hear them.

What I have said is that a picture hanging on a wall that nobody has described for me what wall it's on, who put it there, why it's there, or any of those things, I don't think you can draw any inference from the existence of that picture because people do things for different reasons.

In my judgment it would be entirely inappropriate to draw the inference, any inference, from the mere existence of a *Time* magazine cover in a frame on any wall anywhere. It's not enough to draw an inference from. And I don't care what the underlying article said.

MR. MOXON: I see the Court's position. I think I fully understand it now.

In that case I have one additional matter to bring to the Court's attention, which wasn't specifically addressed, and that is that the article itself, just the cover, not the article but the cover that's hanging in Judge Ideman's Chambers, is a parity of the book *Dianetics,* The Modern Science of Mental Health, which was the foundational book of the Scientology religion. There are many millions of copies published.

On the *Dianetics* book there's a picture of a volcano and it says "Dianetics" at the top. This is a parity that has the volcano. Growing out of it are octopus arms and "Cult of Greed." This octopus arms of Scientology being

this octopus as the cult of greed is what's hanging in the chambers.

Now, Judge Ideman, obviously, as does this Court and as any Court, controls the employees in his chambers. You're right, Your Honor, we don't know exactly what wall it was hanging on.

We have a declaration from an eyewitness who testified, and her testimony is unrefuted that this highly offensive photograph, essentially, this picture, is hanging there.

Now, if this was something like a swastika, I don't know if we'd be having this discussion.

THE COURT: I've heard that argument, you've made that argument. I would respond — and this is as far as I'm going to go to this — that case has generated a lot of paper, it's caused Judge Ideman and his staff to do a lot of work, it is a case that is known to exist — *Time* magazine is a widely circulated, well known publication — a case that has generated, I presume, a lot of attention and a lot of work in that office, made its way to the cover of *Time* magazine, and somebody undertook to take that cover and put it on the wall.

There is no question that cover displays some notoriety. It doesn't, in my judgment, display any attitude in and of itself of anybody who put it there.

Time magazine has independent significance. This lawsuit in that chambers, if it doesn't occupy a lot of attention, I'd be surprised.

I don't think you can infer from *Time* magazine, which is independent, as I said, its portrayal of whatever it was chosen to portray, I don't think you can take that as evidence of any state of mind for anybody that chose to

hang it there. I simply don't believe that, so I don't credit it for that.

MR. MOXON: I see the Court's point.

As far as certainly we don't know what Judge Ideman's state of mind is. He hasn't filed anything in response, although it's my understanding that the papers have all gone to him.

THE COURT: He has no opportunity to —

MR. MOXON: No obligation to, of course.

THE COURT: Not obligation, opportunity.

MR. MOXON: The point perhaps isn't then, Your Honor, what inference should be drawn, but in the standard of an extremely serious case, three cases that Judge Ideman is presiding over, whether or not there's an appearance, whether or not all these matters, Mr. Jeglikowski, the *Time* magazine, the other comments that have been made, whether or not they raise the appearance which should cause the Court in the position it's in with having to make very important decisions with respect to it, to millions of individuals who have faith in this religion, whether or not it wouldn't be better for the administration of justice to have some other judge preside who is not under this cloud, that's the only point, Your Honor.

THE COURT: I understand the point, and I don't think so, because these cases have been before Judge Ideman for a long time, and there is the corresponding consideration that if it is true that what the Church of Scientology doesn't like about Judge Ideman is that reaction to the evidence that they've put before him, and that's why they want a different judge, the appearance of impropriety to the other people of allowing a change at this late stage is at least as high.

The law is clear that it has to be evidence and reason for bias that pre-exists the case itself, it cannot be things that come out of the case itself.

With a case that's gone on for a long time, there is always reason to ask the question if the real reason, if people want a change of judge, isn't because they have some inkling about what the judge thinks about what he's already seen about the case.

That is not an appropriate basis for a recusal.

MR. MOXON: I agree, Your Honor; however, in this case we don't know how Judge Ideman acquired the viewpoint he has with respect to Scientology —

THE COURT: Indeed, I don't think you know that he has a viewpoint.

MR. MOXON: No.

Again, Your Honor, we haven't deposed Judge Ideman, and Judge Ideman has not spoken as to it, but the inferences here are substantial, there are so many of them that it raises a really substantial question.

It's that question, if the Court looks completely objectively at all these facts, shouldn't another judge sit on these cases that would demonstrate that the United States District Court has placed itself on a higher standard than anyone, that the United States District Court has demonstrated that it will not allow any even potential of impropriety or bias to enter into one of these cases.

THE COURT: I understand your position, and I'm now finished hearing argument. I will, before I address the decision, say again what I just said.

After a case has gone on for a long time, then the appearance of impropriety of permitting a judge to be

replaced, if there is insufficient objective reason for it, is a greater appearance of impropriety than refusing to have him be replaced.

We are left with the issue, is the objective reason that you've asserted for believing that he has some bias sufficient to support a conclusion that he does.

MR. MOXON: I'm not quite sure I understood, Your Honor.

THE COURT: It's just what I said.

MR. MOXON: We didn't know of course any of this until the case happened because there was no communication with Judge Ideman —

THE COURT: I understand.

The question is, are the things you have asserted sufficient to believe there is a bias that doesn't result from the conduct of the case.

MR. MOXON: Yes.

THE COURT: And that question hasn't changed. That's the question you posed by your papers, that's the question they addressed in their answer, and that's the question that I propose to decide.

MR. MOXON: I wish we could resolve this, the matter of some of the things that have come in. They clearly don't relate to the case itself, such as —

THE COURT: We're not going to hear any of those things. They're in the papers and I'm not going to hear more about them.

I'm not going to use the gavel again. There are other ways to not have that kind of conversation. I chose to use the gavel the first time.

MR. MOXON: Thank you, Your Honor.

THE COURT: All right.

MR. RATHBUN: Your Honor, just address one point, you stated that you can't draw inferences, but in — matter of fact from what you've stated, it's clear that you have drawn some inferences.

You stated that *Time* magazine is independent, and you also stated —

THE COURT: No, I didn't say that. I said it has independent significance.

MR. RATHBUN: Independent — how's that?

THE COURT: *Time* magazine is an entity, it's a magazine with a large circulation. It has independent significance that has nothing to do with this lawsuit. That's what I said.

And I submit to you that you're exhibiting your own bias when you hear me say that, because I didn't say that.

MR. RATHBUN: No, I understand what you're saying now, but the same could be stated about —

MR. BRIGHT: May I interrupt?

THE COURT: Yes, you may.

MR. BRIGHT: The defendants are objecting to Mr. Rathbun, who is not an attorney, addressing the Court.

THE COURT: Sustained.

You may not. I didn't realize that.

MR. RATHBUN: Can I just make —

THE COURT: You may not; you may not. I'm sorry.

MR. RATHBUN: The other —

THE COURT: You will stop, or I'll —

May I have him escorted from the Court.

(Mr. Rathbun removed.)

THE COURT: You will now have a ruling.

As I've indicated, the law is clear, the bias must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. That is the holding in the case of *United States versus Grinnell.* That is the issue to be decided.

The things in the case of Aznaran versus Church of Scientology, as I understand the allegation, the thing that is thought to demonstrate the bias is that Judge Ideman accused both parties of flagrant misconduct, blatant disregard of the Court's orders and outrageous litigation tactics.

The Church of Scientology, as I understand it, largely undisputed, says that the blatant disregard of the Court's order was not attributable to it.

The flagrant misconduct, that's sort of an undefined phrase, and outrageous litigation tactics is an undefined phrase, too.

To the extent that the blatant disregard of the Court's orders was confined to the other party, the problem, as I see it, is simply in the use of the conjunctive "and."

The conclusion drawn that the barrage of paper and the barrage of orders that he drew, to call it outrageous litigation tactics and/or flagrant misconduct, even if this Court were to disagree with those conclusions, which I am not saying I do, I'm simply saying, if I did disagree with

those conclusions, they would not, in my judgment, show any bias that results from anything but the judicial process.

I don't know whether that sort of thing that has happened at this hearing has happened in Judge Ideman's court. It has not been alleged, but I would have considered it flagrant misconduct.

I don't know whether I would call it outrageous litigation tactics or not, but I cannot say that it is possible, based on the record before me, to conclude that his statements that both parties had engaged in flagrant misconduct, blatant disregard or outrageous litigation tactics represent a pre-existing bias that didn't result from the judicial process. I would deny the motion in that case.

I'm considering altogether, so I would put them altogether.

The next one is Religious Technology Center versus Robin Scott. There, as I understand the issue, Special Master Kolts, who had not received a transcript from a June 19 hearing, noted that fact and said that he had learned that the reporter and her husband were major financial contributors to Scientology, and that he had a doubt on the verification of disinterest.

In my judgment, the subsequent conduct by Judge Ideman did not accept at face value that there was a problem, he simply left the question open and said that it did require looking into.

I don't disagree with that conclusion. That is a conclusion again that he drew in the course of the litigation based on what he had seen of the entire litigation and the particular fact, and having said no more than, so far as I can tell from the record, that it should be looked into, I

cannot conclude that that evidence is a pre-existing bias or any other bias that arises from outside the proceeding. I would therefore deny the motion to recuse in all cases based on those two sets of factors.

The third one is Church of Scientology of California versus United States, Sandra Baker. I must say, I'm not awfully persuaded by the government's argument in that case, but since the Scientology position is basically a mirror of the other two positions, without the other two, this one must fall, and I'm not persuaded by the other ones, so I would deny the motion to recuse in that case.

I think I have spoken at more than sufficient length about the *Time* magazine thing. I don't choose to dignify this proceeding with anything that's in the article. The article is what it is. Whether it is true on its own terms or whether it's not true on its own terms, I don't care.

I haven't read that article, and while I did read the characterizations of that article that were made by the Church of Scientology in this proceeding, I didn't really pay a lot of attention to the opposition to it, so that what I know about that article is what the church has told me about that article.

The reason for that is because as I have said, in my judgment, the case in Judge Ideman's Chambers I would expect to be considered a major case.

If the subject of a major case in a judge's chambers appears on the cover of *Time* magazine, I simply don't think anybody can draw any inferences that there is some extra-judicial bias from the fact that that is there, and I don't make that inference.

And it's not in my chambers, and I don't think you could draw that inference if it were in my chambers. I

don't think there is any inference that you could draw from that.

And that is an article that I did not read. Although I did read it for purposes of considering this motion, I don't think it's content can fairly be ascribed as being a reflection of the state of mind about this party just because that cover is someplace in Judge Ideman's Chambers.

I don't know how it got there, I don't know who put it there. I don't know that it's there, but I'm accepting as true for the purpose of this ruling that it is there at this very minute. I don't know that it is, nobody said that; it may not be.

I assuming that it was there for purposes of decision. I'm assuming that it is there, and I still don't think you can draw any inference from that fact as to Judge Ideman's state of mind or the state of mind of anybody in his chambers.

That is a ruling, and unless there is something further —

MR. FAGELBAUM: The only other matter, Your Honor, is the question of the appropriateness of sanctions in this regard as we set forth in our papers. We will not reargue it here.

This is really the second motion to recuse Judge Ideman made by the plaintiffs in the RTC, Scott and Wollersheim cases.

In essence, they repeat what they've said before and they only add the cosmetic element of the *Time* magazine article.

We think, under the circumstances, because of the repetition, because of the prior rulings by the Ninth

Circuit and by Judge Hatter on this related matter, the repetitive nature of this filing and the vacuousness of its content would permit the Court to issue appropriate sanctions.

THE COURT: Well, does anybody want to respond to that issue?

MR. DRESCHER: I'll respond briefly to that, Your Honor.

I think it's clear that the Court has read the papers, and I didn't hear anything in the Court's analysis of the arguments to suggest that it was frivolous.

The Court disagreed, the Court —

THE COURT: Let me speak to that so you can understand. I really didn't come out here thinking about the sanctions issue.

I was troubled and am troubled by the fact that the *Time* magazine article was not drawn to my attention until the reply brief. That I didn't understand well.

MR. DRESCHER: I can explain that.

THE COURT: And then I was even more troubled at what appeared to be a very conscious and strong attempt to force discussion of that article into this proceeding.

If it is true that there is nothing new here — and that I haven't analyzed it — if it is true that there is nothing new here but that *Time* magazine article, then I think the question of sanctions has to be considered with care.

MR. DRESCHER: If I may address those points one at a time, I think I can give the Court some guidance.

THE COURT: Sure.

MR. DRESCHER: The reason that the frame and cover of *Time* magazine did not appear in any of the papers until the series of replies was simply that the moving parties were unaware of it until the interim between the filing of the initial papers, the date —

THE COURT: So that's easy enough.

MR. DRESCHER: — the date of Ms. Chromoy's declaration and the date that she references in her declaration as to when she made the information known establishes that.

I don't know it offhand, but it is after the moving papers —

THE COURT: I'll accept that for the moment.

So then we just ignore that entirely, and then the question is raised, is there in fact anything new here but that.

MR. DRESCHER: Well, plainly there is.

And I can just give the Court something like a headline version of things the Court has read so the Court will see that there are new things.

For example, the entire colloquy that lead to the filing of this motion in the RICO cases, the Scott case and Wollersheim consolidated cases, occurred long after the matters that are addressed in the first motion to recuse which was brought several years ago.

It erupted — frankly, that's the word — over the issue of a letter that Mr. Fagelbaum sent this summer, so to badly characterize this as simply a regurgitation, that's just not true.

These are events that took place within the last few weeks in respect to that case, Mr. Fagelbaum's case. And

I think if the Court simply recalls the way it's laid out, there's reference to the earlier motion, there was certainly no effort to hide or disguise it. There is a mention to some of its content.

The motion to recuse in those consolidated Scott and Wollersheim cases runs directly from the incident that occurred in August or September — I can't remember which, but long after —

THE COURT; If I reconsider, I'll give your another opportunity to reargue. Right now I'm not going to do sanctions. I'll look at it again. If I reconsider, we'll have to have further opportunity to argue.

I'm going to say this — and the record will reflect it — in my judgment, by the *Grinnell* standard — the Supreme Court of the United States — this was a very, very weak motion.

Were it to be done a third time, I would expect sanctions to be issued because I am very doubtful that this motion should have been filed at all.

The *Time* magazine thing, I really don't think people ought to differ about its significance, but this was filed long before, as you put it, you knew about that.

The other grounds are very, very weak, very weak, and were another such motion ever to be filed with no stronger grounds that those, if it got to me, I know I would sanction for it, but that hasn't happened yet.

MR. DRESCHER: The Court's comments are understood, and I'm not going to argue —

THE COURT: That hasn't happened.

What I will do, I will look again. Right now I'm accepting at face value what you said. I'll look again at the papers.

If I reach a different conclusion that the one I've tentatively reached here, that while this was weak, without some sort of prior warning that a similar one filed in the future would result in sanctions, I don't think it's appropriate to do it. If I change my mind about that, we'll start all over again.

MR. DRESCHER: All right.

THE COURT: And I don't expect to change my mind.

Right now, I looked at it, I treated it as a serious matter. I didn't come to the bench saying, that's an outrage, that ought to be sanctioned.

And while I was obviously made uncomfortable by some of the things that happened here, I haven't changed my judgment about it, I don't think. I know I haven't as I sit here, changed my judgment about the motion itself. If I do, I'll let you know.

MR. DRESCHER: I'm sure by checking those facts it will allay any concerns the Court may still have.

THE COURT: Anything else for today; if not, we'll be in recess.

CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPTION, REPORTED TO THE BEST OF MY ABILITIES, OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

_____

TERRY KRAMER
CERTIFIED VERBATIM
REPORTER

_____

DATE

Supreme Court, U.S.
FILED
MAY 4 1992
OFFICE OF THE CLERK

No. 91-1376

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY INTERNATIONAL, ET AL.,
PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly denied the petition for a writ of mandamus seeking recusal of the trial judge pursuant to 28 U.S.C. 455(a).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-3a) and the opinion of the district court (Pet. App. 4a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1991. An order denying the petition for rehearing was entered on January 30, 1992 (Pet. App. 1a). The petition for a writ of certiorari was filed on February 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are various components of the Church of Scientology that are involved in litigation in several cases in the United States District Court for the Central District of California. Each of these cases is assigned to United States District Judge James M. Ideman (Pet. 2). Petitioners filed motions in these cases to recuse Judge Ideman (Pet. App. 4a). In support of the motions, petitioners alleged that a framed cover of the May 6, 1991, edition of *Time* magazine—which describes the Church of Scientology as "The Cult of Greed"—was seen hanging on the wall of the work space of Judge Idleman's staff (Pet. 4). Petitioners claim that this creates an appearance of partiality that requires the recusal of Judge Ideman (Pet. 3).

In one of the cases, petitioners seek to enjoin the government from collecting taxes and seek damages for the alleged unlawful collection of taxes and for the alleged unlawful disclosure of return information. *Church of Scientology of California* v. *United States of America, Sandra Baker, et al.*, No. CV 90-2042 (JMI). The defendants named in that case were the United States of America and four Internal Revenue Service employees. Petitioners alleged that Judge Ideman should be recused in this case for the additional reason that one of the individual defendants (IRS Assistant District Counsel Charles Jeglikowski) had been posted from 1973 to 1976 with Judge Ideman at the 78th Military Law Center in San Pedro, California. The evidence reflected that, during that three-year period, the Jeglikowskis and the Idemans attended "one or two" social functions together (Pet. 9).

2. Pursuant to local rule, Judge Ideman referred the recusal motions to another judge—United States District Judge Letts—who, after a hearing, denied the motions (Pet. App. 4a). Judge Letts concluded that it was inappropriate to draw any inference as to Judge Ideman's state of mind simply because the cover of *Time* magazine hung in the staff area of his chambers (Pet. App. 15a-16a). The court noted that the case has generated a great deal of work for Judge Ideman and his staff (Pet. App. 10a-11a):

> [A] case that has generated, I presume, a lot of attention and a lot of work in that office, made its way to the cover of *Time* magazine, and somebody undertook to take that cover and put it on the wall.
>
> * * * * *
>
> I don't think you can infer from *Time* magazine, which is independent, * * * evidence of any state of mind for anybody that chose to hang it there. I simply don't believe that, so I don't credit it for that.

The court also rejected as irrelevant any prior relationship asserted to exist between Judge Ideman and one of the defendants (Pet. App. 14a).

3. The court of appeals held that the district court's findings were not clearly erroneous and denied the petition for writ of mandamus (Pet. App. 2a-3a). The court further observed that the harm, if any, alleged by petitioners is correctable on appeal, if necessary (*ibid.*).

ARGUMENT

The court of appeals properly denied the petition for a writ of mandamus. The decision of the court of appeals does not conflict with the decisions of this Court or of any other court of appeals. Further review is therefore not warranted.

1. A federal judge is to recuse himself, either on his own motion or on the motion of a party, in any proceeding in which his impartiality might reasonably be questioned. 28 U.S.C. 455(a). The statute does not specifically provide for appellate review of rulings on a motion for recusal. Courts have held, however, that mandamus review of recusal motions is available because "[P]ublic confidence in the courts [requires] that such a question be disposed of at the earliest possible opportunity." *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981) (quoting *In re Union Leader Corp.*, 292 F.2d 381, 384 (1st Cir.), cert. denied, 368 U.S. 927 (1961)). See *In re Aetna Casualty & Surety Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) (en banc); *Moody* v. *Simmons*, 858 F.2d 137 (3d Cir. 1988), cert. denied, 489 U.S. 1078 (1989); *Union Carbide Corp.* v. *U.S. Cutting Service, Inc.*, 782 F.2d 710, 712-713 (7th Cir. 1986); *In re City of Houston*, 745 F.2d 925, 927 (5th Cir. 1984); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1025 (9th Cir. 1982); *In re International Business Machines Corp.*, 618 F.2d 923, 926-927 (2d Cir. 1980); *Bell* v. *Chandler*, 569 F.2d 556, 559 (10th Cir. 1978); *In re Rodgers*, 537 F.2d 1196, 1197 n.1 (4th Cir. 1976) (per curiam). See also *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1301 (9th Cir. 1982),

affirmed for lack of a quorum pursuant to 28 U.S.C. 2109, 459 U.S. 1191 (1983).[1]

The principles governing the use of mandamus are summarized in *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 289 (1988):

> This Court repeatedly has observed that the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations. See, *e.g.*, *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976). The federal courts traditionally have used the writ only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). In accord with this historic practice, we have held that only "exceptional circumstances amounting to a judicial 'usurpation of power'" will justify issuance of the writ. *Will* v. *United States*, 389 U.S. 90, 95 (1967), quoting *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945). Moreover, we have held that

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[1] In *In re Cement Antitrust Litigation*, the Ninth Circuit reviewed on a petition for a writ of mandamus a district court order granting recusal. See 688 F.2d at 1299. Based on that opinion, petitioners erroneously assert (Pet. 14-15) that the Ninth Circuit will not review, on a petition for a writ of mandamus, an order of the district court *denying* a recusal request because that order would be fully reviewable on appeal. In *In re Cement Antitrust Litigation*, however, the court merely discussed the availability of post-judgment review as one of five relevant factors in determining whether mandamus is appropriate. The court did not conclude that the ability to allege error on appeal precluded mandamus relief. See 688 F.2d at 1301 ("the guidelines serve only as a useful starting point, an analytic framework for determinations regarding the propriety of mandamus relief").

> the party seeking mandamus has the "burden of showing that its right to issuance of the writ is 'clear and indisputable.' " *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384 (1953), quoting *United States* v. *Duell*, 172 U.S. 576, 582 (1899).

A recusal motion under Section 455 is, correspondingly, committed to the sound discretion of the district court. *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988), cert. denied, 490 U.S. 1102 (1989); *Sewer Alert Committee* v. *Pierce County*, 791 F.2d 796, 798 (9th Cir. 1986); *Hinman* v. *Rogers*, 831 F.2d 937, 939 (10th Cir. 1987); *United States* v. *Haldeman*, 559 F.2d 31, 139 n.359 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). See also S. Rep. No. 419, 93d Cong., 1st Sess. 5 (1973); H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5 (1974). In ruling on a petition for writ of mandamus, the court of appeals is to determine whether the district court abused its discretion in denying the motion to recuse. *In re Drexel Burnham Lambert Inc.*, 861 F.2d at 1312; *In re United States*, 666 F.2d 695 (1st Cir. 1981). See also *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). The test under 28 U.S.C. 455(a) is an objective one: whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality. *Lilijeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 861 (1988); *Sewer Alert Committee* v. *Pierce County*, 791 F.2d at 798; *United States* v. *Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986) (per curiam). As a result, the issue presented is ultimately a factual one: whether the proper inference to be drawn from the alleged facts is that the impartiality of the trial judge is reasonably in doubt.

2. In implementing this general legal standard, courts have employed a variety of phrases to describe the same conclusion. Some have stated that the petitioner must show a clear and indisputable right to relief. See, *e.g.*, *In re Drexel Burnham Lambert Inc.*, 861 F.2d at 1312; *In re United States*, 666 F.2d at 695. Other courts have stated that the petitioner must establish that the district court abused its discretion in ruling on the recusal motion. See, *e.g.*, *In re Aetna Casualty & Surety Co.*, 919 F.2d at 1143; *Moody* v. *Simmons*, 858 F.2d at 142. These differences in phrasing of the appropriate standard for review do not result in differences in the objective or the substance of that review.

Moreover, when (as here) the petition for writ of mandamus raises only questions of fact, the findings of the district court are properly reviewed by the court of appeals under the familiar "clearly erroneous" standard. In this case, the question for review was whether an appearance of partiality was raised by (i) the fact that the *Time* magazine cover relating to the Church of Scientology was on the wall of the work space of Judge Ideman's staff and (ii) the fact that almost 20 years ago IRS Assistant District Counsel Jeglikowski and Judge Ideman were both posted in the 78th Military Law Center in San Pedro, California, during which time they attended "one or two" social functions together (Pet. 9). After a hearing before United States District Judge Letts, the court resolved these inherently factual issues against petitioners. The court determined that a reasonable person could not draw any inference from the mere existence of the *Time* magazine cover in the

staff's work area (Pet. App. 16a)[2] and also rejected as irrelevant the prior, slight relationship, occurring many years ago, between the judge and defendant Jeglikowski (Pet. App. 14a). The court of appeals properly reviewed the district court's findings for clear error. In this situation, "[t]he appellate court * * * must ask itself not whether it would have decided as did the trial court, but whether that decision cannot be defended as a rational conclusion supported by reasonable reading of the record." *In re United States*, 666 F.2d at 695. See also *In re Drexel Burnham Lambert Inc.*, 861 F.2d at 1312; *In re City of Houston*, 745 F.2d at 927.[3] The fact bound question whether the district court findings were clearly erroneous does not warrant further review.

---

[2] Petitioners assert (Pet. 27-29) that the district court inquired only into whether Judge Ideman had "a personal bias or prejudice concerning a party" (28 U.S.C. 455(b)(1)) and erred in not determining whether "his impartiality might reasonably be questioned" (28 U.S.C. 455(a)). The district court, however, stated, "I still don't think you can draw any inference from [the magazine cover] as to Judge Ideman's state of mind" (Pet. App. 16a). The court thus found that Judge Ideman's impartiality could not reasonably be questioned because a reasonable person would not draw an inference of partiality from these facts.

[3] Petitioners offer no support for the proposition (Pet. 24-27) that the court of appeals should determine *de novo* the proper inference to be drawn from the alleged facts. Although petitioners cite numerous cases in which courts of appeals have reviewed denials of recusal motions (Pet. 16-20), none of those cases holds that the district court's factual findings are to be reviewed *de novo*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondent.

v.

VICKI J. AZNARAN, et al.,

Real Parties In Interest.

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No. 91-1376

In The

Supreme Court of the United States

October Term, 1991

CHURCH OF SCIENTOLOGY INTERNATIONAL, et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, et al.,

Respondent.

v.

VICKI J. AZNARAN, et al.,

Real Parties In Interest.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

Real Parties In Interest Vicki J. Aznaran and Richard N. Aznaran,[1] oppose the petition for writ of certiorari to

[1] Parties to *Vicki J. Aznaran and Richard N. Aznaran v. Church of Scientology of California, et al.*, No. CV 88-1786 (JMI) (hereinafter referred to as "the Aznarans")

review the judgment of the United States Court of Appeals for the Ninth Circuit filed by petitioners herein.

OPINIONS BELOW

The order of the court of appeals denying the petitioners' petition for a writ of mandamus (Order filed December 4, 1991 in Ninth Circuit No. 91-70659) is unreported. The denial of the petition for rehearing and suggestion for rehearing en banc (Order filed January 30, 1992, in Ninth Circuit No. 91-706592a) is unreported. The November 22, 1991 order of the district court denying the motions to recuse (Order filed November 22, 1991, in U.S. District Court No. CV 88-1786 JMI) is unreported. There is a transcript of the hearing on the motions in the district court during which the court issued its oral decision. (Transcript of Proceedings, Friday, October 25, 1991 in No. CV 90-2042 JMI)

JURISDICTION

The order of the court of appeals was filed on December 4, 1991. The denial of the petition for rehearing was filed on January 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455(a) provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in

any proceeding in which his impartiality might reasonably be questioned."

28 U.S.C. § 455(b)(1) provides: "He shall also disqualify himself in the following circumstances: (1) where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings."

28 U.S.C. § 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

By means of the petition before the Court, Scientology attempts to secure the support of the Court in order to buttress its attack on the trial judge after every lower court has rejected Scientology's meritless ploy. The reason the petition is a ploy is because it has been taken, as was the original motion to recuse, solely for the purpose of delaying the jury trial of the Aznarans' case against Scientology. The case was originally filed on April 1, 1988. Trial of the matter was set to commence on October 15, 1991. On September 4, 1991, 41 days before trial and 1617 days after commencement of the suit, Scientology sought to recuse the Honorable James M. Ideman, the trial judge, in the hope of replacing him with another having no familiarity with the factual posture and legal history of this extensive and often caustic litigation.

The underlying case arises from the deceptive recruitment of Richard N. Aznaran and Vicki J. Aznaran into the "church" of Scientology and Scientology's subsequent 15-year exploitation of each of them. Said exploitation included, but was not limited to, subjecting them to tactics of undue influence and coercive persuasion without their knowledge or consent, destroying their marriage in the name of Scientology practices so that a Scientology leader could sexually seduce Vicki and make Richard a virtual work-slave, threatening them with Scientology's retributive policy known as the "Fair Game Policy" by which Scientology could ethically (according to its own peculiar justice system) – and literally – destroy plaintiffs, and ultimately condemning Vicki to serve a sentence in a forced-labor camp in the California desert known as "Happy Valley" where the conditions were so filthy that her uterus became infected concerning which she was never allowed to obtain any medical treatment whatsoever.

Scientology did, and does, not want these and many more extremely distasteful facts to be tried to a jury. Thus, it brought the baseless motion to recuse as a means of delaying the jury trial which was formerly set for October 15, 1991.

Defendants alleged that Judge Ideman singled out Scientology and "falsely accus[ed]" it and its counsel of "flagrant misconduct," "blatant disregard of [the] Court's Orders," and "outrageous litigation tactics;" that the trial judge on the motion to recuse, the Honorable J. Spencer Letts, applied the wrong standard; and that the Ninth Circuit improperly denied mandamus. The history of this

case, and the standards applied by the various courts below, show that such is not true.

In support of its motion below, Scientology marshalled a litany of claimed transgressions which, it contended, illustrated the bias and prejudice of Judge Ideman toward Scientology. Judge Letts concluded that the motion was extremely weak.

In the trial court Scientology made the claim that "virulent religious bigotry has infested Judge James M. Ideman" which required his recusal. (Supplemental Memorandum In Support of Motion to Recuse the Honorable James M. Ideman, No. CV 88-1896 JMI at p. 1:22-28). The use of such invective not only exposed the absence of any legitimate factual predicate for the motion to recuse below, it insulted the even-handedness with which Judge Ideman treated the parties in the litigation.

On or about May 1, 1989, Scientology focused its then-religiously-claimed objection on plaintiffs' characterization of it as a "Cult" and sought an Order from Judge Ideman striking all such references. Scientology stated:

> Plaintiffs' Amended Opposition is extraordinary in one regard – it is the most invective-filled, anti-religious paper that these defendants and their collective counsel have ever seen. The Amended Opposition is replete with degrading remarks having no conceivable relevance to the issues at hand. In just the introduction itself, plaintiffs feel required to describe a religious organization with millions of members, as "pathetic," "criminal," causing "terror," "evil," a "menace."

(Defendants' Ex Parte Motion To Strike filed May 1, 1989, at pp. 10:18-11:2)

Judge Ideman quickly granted Scientology's motion. He said:

> The defendants' motion to strike all derogatory references to defendants in plaintiffs' amended opposition is also GRANTED. Every reference in plaintiffs' opposition to defendants as a "Cult, Scientology Cult" or "SC" and every reference to defendants' religious practice of auditing as "brainwashing," "mind control" or other pejorative description shall be stricken from the record. The Court will continue to treat defendant, Church of Scientology ("defendant") as a Church until plaintiffs allege facts to persuade the Court that defendant should not be treated as a church in this action. The parties are free to allege facts in their written briefs however, the Court will not tolerate name calling or scurrilous terminology in the parties' papers. Therefore, the Court exhorts the parties to treat one another with respect and common courtesy.

(Order filed May 4, 1989 at pp. 1:18-2:10)

After Judge Ideman's May 4, 1989 Order, he denied two summary judgment motions brought by Scientology. (Order Denying Defendants' Motion For Summary Judgment filed May 25, 1989; Order Denying Defendants' Motion For Summary Judgment filed April 26, 1991)

In May 1991, Scientology tricked plaintiffs into discharging their counsel of record by asserting the case could be settled provided that said counsel, Ford Greene, not be in any way involved. (Declaration of Richard N. Aznaran executed July 1, 1991; Declaration of Vicki N.

Aznaran executed July 1, 1991) After plaintiffs discharged Ford Greene on June 7, 1991, (Declaration of Ford Greene filed August 2, 1991 at p. 2:15-17), Scientology withdrew its offer to engage in settlement negotiations. (Declaration of Barry Van Sickle executed July 1, 1991)

On June 19, 1991, after the Aznarans discharged Greene, and were without representation, Scientology noticed for hearing a 50-page summary judgment motion (plus a 22-page separate statement), supported by 658 pages of exhibits, for July 22, 1991, based upon the statute of limitations. (Declaration of Ford Greene filed August 2, 1991, at p. 3:1-11)

With the potentially dispositive summary judgment motion pending, plaintiffs were without counsel. Relying on a state court finding that he had not violated any attorney client confidences, former Scientology lawyer Joseph A. Yanny agreed to represent plaintiffs and filed his substitution on July 1, 1991. (Declaration of Ford Greene filed August 2, 1991, at p. 2:18-21, Statement of Decision in *RTC v. Yanny,* L.A.S.C. No. C 690 211 at pp. 1-2)

On July 3, 1991, Yanny moved to continue the hearing date on the statute of limitations summary judgment motion for 60 days. (Declaration of Ford Greene filed August 2, 1991, at p. 3:27-4:3)

On July 5, 1991, Scientology filed a 98-page summary judgment motion (plus a 16-page separate statement) based on the First Amendment supported by 926 pages of exhibits noticed for hearing on August 5, 1991. (Declaration of Ford Greene filed August 2, 1991, at p. 3:1-11)

On July 9, 1991, Yanny moved to continue the hearing date on the first amendment summary judgment motion for 60 days. (Declaration of Ford Greene filed August 2, 1991, at p. 4:4-7)

On July 24, 1991, Judge Ideman summarily vacated Yanny's substitution, reinstated Ford Greene as attorney of record, and ordered that all remaining motions be noticed no later than August 19, 1991 and be no longer than 35 pages in length. (Order filed July 24, 1991)

On July 26, 1991, Ford Greene first received notice that Judge Ideman had reinstated him as Plaintiffs' Counsel. (Declaration of Ford Greene filed August 2, 1991, at p. 4:8-15)

On July 29, 1991, Scientology filed four more motions, all noticed for August 19, 1991:

- 35-page Motion to Exclude Plaintiffs' Designated Expert Witness with 405 pages of supporting exhibits;
- 31-page Motion to Dismiss with 303 pages of supporting exhibits, plus 6-page supplemental brief;
- 16-page Motion for a Separate Trial on the Issue of Releases and Waivers with 114 pages of supporting exhibits;
- 11-page Motion to Strike All Papers filed by Joseph A. Yanny with 15 pages of supporting exhibits.

(Declaration of Ford Greene filed August 2, 1991, at p. 3:1-11)

On July 31, 1991, plaintiffs' counsel Ford Greene reobtained possession of plaintiffs' case file in this matter

and spoke with Judge Ideman's clerk who advised him that Judge Ideman had stricken all papers filed by Joseph A. Yanny. (Declaration of Ford Greene filed August 2, 1991, at p. 4:16-28)

On August 2, 1991, the Aznarans sought an ex parte order allowing them to file their oppositions to all *six* then pending motions totalling 285 pages with 2,421 pages of exhibits on or before August 26, 1991. (Plaintiffs' Ex Parte Application filed August 2, 1991)

On August 9, 1991, Judge Ideman denied plaintiffs' August 2 ex parte application, and stated:

> In light of the Court's inadvertently approving Plaintiffs' substitution of counsel and the subsequent reinstating of Ford Greene as Plaintiffs' counsel, however, the Court has determined that, in fairness to the parties, some extension of time for filing opposition and replies to *already pending* motion is appropriate. Therefore, although the Court does *not* by this Order alter the finality of the August 19, 1991 date for the filing of any motions in this action, the Court hereby GRANTS Plaintiffs an extension until 3:00 p.m. on August 19, 1991 to file any opposition to any pending motions in this action. The Court also hereby GRANTS Defendants an extension until 3:00 p.m. on August 26, 1991 to file any reply briefs to any pending motions in this action. All pending motions will be continued to the September 9, 1991 hearing date in order to permit the Court to rule after all submissions have been made.

(Order filed August 9, 1991)

On August 23, 1991, in conjunction with appropriate ex parte applications, the Aznarans filed two Genuine Statements of Issues supporting their opposition to the summary judgment motions on the statute of limitations and the First Amendment. Particularly as to the Genuine Statement which pertained to the statute of limitations summary judgment motion, Scientology made some glaring misrepresentations concerning the facts in the record concerning which the Aznarans suggested sanctions should be imposed.

On August 26, 1991 Scientology filed a Supplemental Memorandum In Support of Defendants' Motion to Dismiss with Prejudice. In support thereof Scientology filed three declarations by Thorn Smith, Edward Austin and Sam Brown.

The Declaration of Thorn Smith, in part, stated:

> I am a licensed attorney in the state of California. . . . [¶] On Saturday, August 3, 1991, I conducted a surveillance at the law offices of Ford Greene, the attorney for the plaintiffs in a federal case pending in Los Angeles, *Aznaran v. Church of Scientology of California* Case No 88-1786 JMI (Ex). The address of his office is 711 Sir Francis Drake Boulevard, San Anselmo, California, which is a storefront in a two-story building. [¶] during the course of that morning, I observed a white male, who was driving a grey Cadillac, having a California tag reading "I MENSA," outside those law offices. [¶] The man I saw took various boxes from the trunk of his car and brought them into Ford Greene's building, along with another unidentified white male.

(Declaration of Thorn Smith dated August 26, 1991)

The Declaration of Edward Austin was identical to that of Thorn Smith. (Declaration of Edward Austin August 26, 1991)

The Declaration of Sam Brown stated:

> I am a licensed private investigator in northern California. . . . I ran a surveillance outside the law offices of Ford Greene at 711 Sir Francis Drake Boulevard, San Anselmo, California during the period from August 15 through August 21, 1991. . . . [¶] During the course of this surveillance, a white male having long brown hair tied back in a pony tail, was observed entering and leaving the Greene law offices each day from the 15th through the 21st. This man spent most of the day at the offices. He was also observed bringing in boxes from Kinko's copy center. [¶] this individual was videotaped entering and leaving the building and standing in front of it on several different days. Some portions of the video have been printed as still photographs and are attached hereto as Exhibit A.

(Declaration of Sam Brown dated August 26, 1991)

On August 30, 1991, Judge Ideman issued an Order in which he stated as follows:

> IT IS HEREBY ORDERED:
>
> The Court hereby ACCEPTS all submissions from both parties in this action submitted to date. By doing so, the Court in no way condones the repeated violations of its Orders in this action. The Court has not been favorably impressed with either counsel's lack of compliance with either its Orders or the Local Rules

throughout the pendency of this action. Because *both* parties' counsel have felt free to repeatedly act in blatant disregard of this Court's Orders and more importantly, in light of the fact that this Court seeks to reach an adjudication on the merits of all pending motions, rather than becoming mired in adjudicating which side in this litigation is more often in violation of the rules of this Court, the Court ACCEPTS all submissions to date and sets a ***final*** date of Wednesday September 4, 1991 at 3:00 p.m. by which Defendants' reply to Plaintiffs' late filed Opposition to the Motion to Dismiss must be filed. *No other submissions regarding pending motions will be accepted by the Court.* Counsel are reminded that this submission should be in accordance with the page limits prescribed by the Local Rules.

In light of the flagrant misconduct of both sides in this action, all pending requests for sanctions are hereby DENIED. Counsel is put on notice, however, that should they continue to engage in outrageous litigation tactics, the Court will not hesitate to use its sanctioning power.

IT IS SO ORDERED.

(Order filed August 30, 1991)

September 4, 1991, Scientology filed the motion to recuse Judge Ideman.

In light of the foregoing litigation tactics, it appears that Scientology implemented the litigation principles articulated by L. Ron Hubbard, the "founder" of Scientology.

In 1960, L. Ron Hubbard instructed his organization on the manner in which Scientology should approach litigation. He stated:

> In the face of danger from Govts or courts there are only two errors one can make: (a) do nothing and (b) defend. The right things to do with any threat are to (1) Find out whether we want to play the offered game or not, (2) If not, to derail the offered game with a feint or attack upon the most vulnerable point which can be disclosed in the enemy ranks, (3) Make enough threat or ***clamor*** to cause the enemy to quail, (4) Don't try to get any money out of it, (5) Make every attack by us also sell Scientology and (6) Win. If attacked on some vulnerable point by anyone or anything or any organization, always find or ***manufacture enough threat*** against them to cause them to sue for peace. Peace is bought with an exchange of advantage, so make the advantage and then settle. ***Don't ever defend. Always attack.*** Don't ever do nothing. Unexpected attacks in the rear of the enemy's front ranks work best. [Emphasis added.]

(Declaration of Vicki J. Aznaran executed September 28, 1991, Exhibit A.)

Thereafter, in 1968 Hubbard wrote:

> DO NOT simply fall back out of communication if you are attacked, but attack, much more forcefully and artfully and arduously. And if you are foolish enough to have an attorney who tells you not to sue, immediately dismiss him and get an attorney who will sue. . . . [¶] In other words, do not, at any moment leave this act unpunished, for, if you do you are harming all other Scientologists in the area. When you are

> attacked it is your responsibility then to secure from further attack not only yourself but all those who work with you. Cause blue flame to dance on the court house roof until everybody has apologized profusely for having dared to become so adventurous as to arrest a Scientologist who, as a minister of the church, was going about his regular duties.

(Declaration of Vicki J. Aznaran executed September 28, 1991, Exhibit B.)

Scientology was unable to tolerate Judge Ideman giving the Aznarans a fair opportunity to respond to the daunting glut of motions Scientology had filed while the Aznarans were sorting out their problems with representation that Scientology's tactics had created in the first place. Thus, Scientology has sought to "[c]ause blue flame to dance on the court house roof" by boldly attacking Judge Ideman as a walking "infest[ation]" of "virulent religious bigotry." Such an assault is no more than Scientology's practice of retribution by litigation.

> The DEFENSE of anything is UNTENABLE. The only way to defend anything is to ATTACK, and if you ever forget that, then you will lose every battle you are ever engaged in, whether it is in terms of personal conversation, public debate, or a court of law. NEVER BE INTERESTED IN CHARGES. DO, yourself, much MORE CHARGING, and you will WIN. And the public, seeing that you won, will then have a communication line to the effect that Scientologists WIN. Don't ever let them have any other thought than that Scientology takes all of its objectives. [Original capitalization.]

(Declaration of Vicki J. Aznaran executed September 28, 1991, Exhibit B.)

Thus, "[t]he purpose of the suit is to harass and discourage rather than to win." (Declaration of Vicki J. Aznaran executed September 28, 1991, Exhibit B.)

> The law can be used very easily to harass, and enough harassment on somebody who is simply on the thin edge anyway, well knowing that he is not authorized, will generally be sufficient to cause his professional decease. ***If possible, of course, ruin him utterly.*** [Emphasis added.]

(Declaration of Vicki J. Aznaran executed September 28, 1991, Exhibit B.)

It has been public knowledge for well over a decade that Scientology admits of no limits when it seeks to recuse a judge which it considers to be hostile. See, The American Lawyer (December 1980) at 30, "Scientology's War Against Judges."

REASONS FOR DENYING THE PETITION

I.

ADOPTION OF ARGUMENTS SET FORTH BY REAL PARTIES *SCOTT*

The Aznarans adopt and join in the arguments set forth in the opposition set forth by Real Parties *Scott* and thus, will not repeat those arguments here.

II.

THE DISTRICT COURT'S ORDER HOLDING THAT PETITIONERS HAD FAILED TO ESTABLISH THAT THE DISTRICT COURT JUDGE'S IMPARTIALITY MIGHT REASONABLY BE QUESTIONED OR THAT HE HAD A PERSONAL BIAS OR PREJUDICE CONCERNING PETITIONERS WAS NOT CLEARLY ERRONEOUS

Scientology alleged below that Judge Ideman singled them out and "falsely accus[ed]" them and their counsel of "flagrant misconduct," "blatant disregard of [the] Court's Orders," and "outrageous litigation tactics." Scientology contended below, and contends here, that there is no possible factual basis for such comments being directed at it. Scientology manipulated the discharge of plaintiffs' counsel by promising settlement were he to be discharged, and then after Scientology accomplished his discharge, withdrew the offer of settlement and loaded up the record with dispositive motions while the Aznarans were in pro per. Such is an "outrageous litigation tactic." The misrepresentations set forth in their Separate Statement of Uncontroverted Fact in relation to the statute of limitations summary judgment motion constitute a "blatant disregard" of the mandate to be honest with the Court. Finally, the ongoing surveillance and videotaping of plaintiffs' counsel and clients is an "outrageous litigation tactic." Any one of the above would provide ample factual predicate for the trial court's comments set forth in its August 30, 1991 Order.

"[T]here is a salient difference between a judge making observations about proceedings and being prejudiced

regarding parties or issues in proceedings." *In re A.H. Robbins Co., Inc.* (D.Kan. 1985) 602 F.2d 243, 248.

"A judge should not recuse himself on unsupported, irrational, or highly tenuous speculation," *Hinman v. Rogers* (10th Cir. 1987) 602 F.Supp. 243, 248, and has as much of an obligation "not to recuse himself when it is not called for as he is obliged to when it is." *In re Drexel Burnham Lambert Inc.* (2nd Cir. 1988) 861 F.2d 1307, 1312, *cert. denied sub nom., Milken v. S.E.C.* (1989) 109 S.Ct. 2458.

In this regard, the Ninth Circuit has addressed the nature and scope of bias necessary to warrant recusal under 28 U.S.C. § 455:

> While bias or prejudice may spring from many sources, often extrajudicial in their origin, the negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes. It is an animus more active and deep-rooted than an attitude of disapproval toward certain persons because of their known conduct, unless the attitude is somehow related also to a suspect or invidious motive such as racial bias or a dangerous link such as financial interest, and only the slightest indication of the appearance or fact of bias or prejudice from these sources would be sufficient to disqualify.

United States v. Conforte (9th Cir. 1980) 624 F.2d 869, 881, *cert. denied* 499 U.S. 1012 (1980). It is clear from the facts in the case at bar that the standard articulated in *Conforte*

has not been met. Scientology's clamor about Judge Ideman's alleged "virulent religious bigotry" has no basis in the record.

Bias or prejudice must arise from "an extrajudicial source and result in an opinion on the merits on some basis other than what the judge has learned from his participation in the case." *United States v. Grinnell Corp.* (1966) 384 U.S. 563, 583. Defendants have made no showing whatsoever that Judge Ideman's alleged bias is predicated upon some extrajudicial source.

Moreover, the fact that Scientology did not like the rulings made by Judge Ideman did not provide any basis for his recusal because "[r]epeated rulings against a litigant, no matter how erroneous, and how vigorously and consistently expressed, are not disqualifying." *Kelly v. New York* (D.Mass. 1956) 139 F.Supp. 319, 320. Thus, it has been long held that "[b]ias or prejudice which can be urged against a judge must be based on something other than rulings in the case." *Brown v. Wilson* (W.D. Penn. 1973) 363 F.Supp. 707, 710 quoting *Berger v. United States* (1921) 255 U.S. 22, 31.

> [W]e cannot agree that adverse rulings by a judge can per se create the appearance of bias under section 455(a). A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias. Judicial independence cannot be subservient to a statistical study of the calls he has made during the contest.

In re International Business Machines Corp. (2nd Cir. 1980) 618 F.2d 923, 929.[1] Thus, "[f]acts learned, opinions formed or adverse rulings made during the course of judicial proceedings do not themselves establish the personal bias or prejudice required for disqualification." *United States v. Scaccia* (N.D.N.Y. 1981) 514 F.Supp. 1353, 1355.[2]

Furthermore, "A timid judge, like a biased judge, is intrinsically a lawless judge." *Wilkerson v. McCarthy* (1949) 336 U.S. 53, 65 (Frankfurter, J., concurring.) This is particularly true in the face of Scientology's penchant for making broad unsubstantiated claims of religious bigotry whenever such allegations serve its purposes of the moment. In fact, the exercise of discretion in connection with late filings do not provide a basis for recusal.

> "Finally, Mr. Barr alleges that Judge Sweigert has repeatedly permitted plaintiff to circumvent the rules of procedure by permitting late filings and delaying the trial date. Control of a court's calendar, and the level of compliance a judge demands of attorneys practicing before him, are matters singularly within the discretion of each individual judge."

Martelli v. City of Sonoma (N.D. Ca. 1973) 359 F.Supp. 397, 401. Contrary to Scientology's claims, the record reflects

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[1] The *IBM* court also stated that it "seems evident that statistics alone, no matter how computed, cannot establish extrajudicial bias. There is no authority for, and no logic in, assuming that either party to a litigation is entitled to a certain percentage of favorable decisions." *IBM*, 618 F.2d at 930.

[2] Accord: *United States v. Anderson* (8th Cir. 1970) 433 F.2d 856, 860.

that Judge Ideman had not disallowed any of its filings. Apparently, Judge Ideman made allowances for the fact that plaintiffs' counsel was a sole practitioner with a single support person working adverse to Scientology's unified defense consisting of *seven* large and well-financed law firms. Judge Ideman exercised his discretion so that a decision on the merits could be made. A review of the record in this case reveals that Judge Ideman has consistently sought to get to the issues in the case, rather than become bogged down in allegations of procedural transgressions.[3]

Also, it "is well settled that actions of a judge in pending or previous litigation in which the movant has been involved are not grounds for disqualification. . . . " *Southerland v. Irons* (6th Cir. 1980) 628 F.2d 978, 980. Thus, Scientology's claims regarding Judge Ideman's alleged bias in the *Scott* litigation are misplaced as well.

A. The Time Magazine Cover

During the October 25, 1991, hearing on the motion to recuse Judge Ideman, the Honorable J. Spencer Letts stated that he was not able to draw any significance from the existence of the *Time* Magazine article. He stated:

> Without being difficult about it, different things capture different people's opinions, and people have things they like, things that tickle

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[3] *See*, Order filed August 30, 1991. (The "Court seeks to reach an adjudication on the merits of all pending motions, rather than becoming mired in adjudicating which side in this litigation is more often in violation of the rules of this Court.")

their sense of humor. There are a lot of reasons why people wear the things they wear, display the things they display.

I just simply think it's inappropriate to draw inferences about any individual who works in those chambers because there is something hanging on the wall in those chambers that I don't know how they [sic] got there. I can't get there from here, but if I thought it was relevant, I would think it was appropriate to consider it.

Transcript of Proceedings, October 25, 1991 at pp. 13-14

The *Time* magazine thing, while I rather thought that defendants might want to address it, it didn't seem then and doesn't seem now anything you can draw any inferences from.

Id. at p. 15

What I have said is that a picture hanging on a wall that nobody has described for me what wall it's on, who put it there, why it's there, or any of those things, I don't think you can draw any inference from the existence of that picture because people do things for different reasons.

In my judgment it would be entirely inappropriate to draw the inference, any inference, from the mere existence of a *Time* magazine cover in a frame on a wall anywhere. It's not enough to draw an inference from. And I don't care what the underlying article said.

Id. at pp. 16-17

. . . I would respond – and this is as far as I'm going to do this -- that case has generated a

> lot of paper, it's caused Judge Ideman and his staff to do a lot of work, it is a case that is known to exist – *Time* magazine is a widely circulated, well known publication – a case that has generated, I presume, a lot of attention and a lot of work in that office, made its way to the cover of *Time* magazine, and somebody undertook to take that cover and put it on the wall.
>
> There is no question that the cover displays some notoriety. It doesn't, in my judgment, display any attitude in and of itself of anybody who put it there.
>
> *Time* magazine has independent significance. This lawsuit in that chambers, if it doesn't occupy a lot of attention, I'd be surprised.
>
> I don't think you can infer from *Time* magazine, which is independent, as I said, its portrayal of whatever it has chosen to portray, I don't think you can take that as evidence of any state of mind for anybody that chose to hang it there. I simply don't believe that, so I don't credit it for that.

Id. at pp. 18-19

Since no inference can be drawn from the presence of a nationally distributed magazine in the work-area of a judge's chambers, its presence provided no basis for the recusal of the trial judge.

B. The Aznarans' Late Filings And Scientology's Outrageous Litigation Tactics

Judge Letts' discussion of Judge Ideman's August 30, 1991 order did not find that the language of said order indicative of bias or prejudice against Scientology. Judge Letts said,

> The things in the case of Aznaran versus Church of Scientology, as I understand the allegation, the thing that is thought to demonstrate the bias is that Judge Ideman accused both parties of flagrant misconduct, blatant disregard of the Court's orders and outrageous litigation tactics.
>
> The Church of Scientology, as I understand it, largely undisputed, says that the blatant disregard of the Court's order was not attributable to it.
>
> The flagrant misconduct, that's sort of an undefined phrase, and outrageous litigation tactics is an undefined phrase, too.
>
> To the extent that blatant disregard of the Court's orders was confined to the other party, the problem, as I see it, is simply in the use of the conjunctive "and."
>
> The conclusion drawn that the barrage of paper and the barrage of orders that he drew, to call it outrageous litigation tactics and/or flagrant misconduct, even if this Court were to disagree with those conclusions, which I am not saying I do, I'm simply saying that if I did disagree with those conclusions, they would not in my judgment, show any bias that results from anything but the judicial process.

> I don't know whether that sort of thing that has happened at this hearing has happened in Judge Ideman's court. It has not been alleged, but I would have considered it flagrant misconduct.
>
> I don't know whether I would call it outrageous litigation tactics or not, but I cannot say that it is possible, based upon the record before me, to conclude that his statements that both parties had engaged in flagrant misconduct, blatant disregard or outrageous litigation tactics represent a pre-existing bias that didn't result from the judicial process. I would deny the motion in that case.

Id. at pp. 24-25

Based upon Judge Letts' statements regarding Scientology's motion to recuse Judge Ideman in the *Aznaran* case, it is clear that Scientology did not provide an adequate basis to support its motion to recuse.

CONCLUSION

For all the reasons set forth above, the petition for a writ of Certiorari should be denied.

Dated: May 5, 1992

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(4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY INTERNATIONAL, *et al.*,

Petitioners,

—v.—

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This petition arises from the refusal of the district court to order the recusal of the Honorable James M. Ideman, pursuant to 28 U.S.C. § 455(a), in four cases involving various churches of the Scientology religion. The recusal motion was based on several grounds, including that a framed cover of *Time* magazine proclaiming "Scientology: The Cult of Greed," hangs in Judge Ideman's chambers. The *Time* cover story itself consists of a vicious one-sided attack on the Scientology religion, its leadership, and its lawyers. Petition for Writ of Certiorari at 2-7 ("Pet. at __"); Appendix E to Petition; *see also* Pet. at 7-12, 27-30. The district court denied the recusal motions based on an incorrect legal analysis in which it inquired into Judge Ideman's subjective state of mind and his actual bias and prejudice, rather than section 455(a)'s objective inquiry into whether the judge's "impartiality might reasonably be questioned." *See* Pet. at 11-13, 27-30; Pet. App. 5a-17a. The court of appeals denied the petition for mandamus because "the harm alleged in the petition is correctable on appeal" (Pet. App. 3a), and also because the "district court's order . . . was not clearly erroneous" (Pet. App. 2a-3a). Pet. at 13, 24-27.

REASONS FOR GRANTING THE PETITION

I. The government concedes an essential element of petitioners' argument to this Court: that mandamus review of recusal motions pursuant to 28 U.S.C. § 455(a) is appropriate because "[p]ublic confidence in the courts [requires] that such a question be disposed of at the earliest possible opportunity." Brief For the United States in Opposition at 4 ("Gov. Opp. at ___") (internal quotations omitted); Opposition of David Mayo, *et al.*, at 8-11 ("Mayo Opp. at __"); *see* Pet. at 14-24. The government's position is unsurprising because it too has sought mandamus review when

the district court has denied its section 455(a) recusal motion. *See, e.g., In re United States*, 666 F.2d 690 (1st Cir. 1981); Pet. at 16 n.14.

Despite this concession, the government glosses over the fact that the Ninth Circuit is the only circuit which currently holds that a finding that "the harm alleged in the petition is correctable on appeal" (Pet. App. 3a) is sufficient to deny a petition for mandamus of a denial of a section 455(a) motion. Thus, even if *In re Cement Antitrust Litigation (MDL 296)*, 688 F.2d 1297 (9th Cir. 1982), *aff'd for lack of quorum*, 459 U.S. 1191 (1983), could be construed as not *absolutely* prohibiting mandamus review of a denial of a recusal motion, *see* Gov. Opp. at 5 n.1; Mayo Opp. at 10-12; Pet. at 15-16, the fact is that in *this* case the Ninth Circuit stated that the availability of a post-judgment appeal is sufficient to deny a mandamus petition (Pet. App. 3a).

Moreover, both the government and Mayo are disingenuous in their attempts to interpret *Cement Antitrust* as not precluding mandamus review of a denial of a recusal motion in the Ninth Circuit. The decision unambiguously states, "We next consider whether a post-judgment appeal would provide an effective remedy and thus *render the exercise of our mandamus authority inappropriate*." 688 F.2d at 1302 (emphasis added). The court of appeals then stated, "the law is that an order *denying* a motion for disqualification is reviewable on appeal after final judgment." *Id.* (emphasis original).

Respondents' efforts to downplay the court's clear enunciation of its view of the law on the ground that this was not the precise holding of the case is

unavailing. Gov. Pet. at 5 n.1; Mayo Opp. at 11-12.[1/] First, the court's statement that the availability of post-judgment relief renders mandamus review inappropriate in the Ninth Circuit could not be clearer. Second, petitioners seek review of the decision below, *not* the decision in *Cement Antitrust*. In *this* case, the court of appeals understandably construed *Cement Antitrust* as requiring the denial of the mandamus petition because of the availability of post-judgment relief (Pet. App. 3a). Third, respondents do not cite, and petitioners have been unable to find, a single Ninth Circuit case in the ten years since *Cement Antitrust* that even suggests that mandamus review is available from a denial of a section 455 motion.[2/] Finally, the

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[1/] Respondent Mayo's assertion that the court's above-quoted view in *Cement Antitrust* "consists of an observation about the decisions of *other* circuits," Mayo Opp. at 12 (emphasis original), is puzzling. The court in fact relied on decisions of this Court, *Berger* v. *United States*, 255 U.S. 22 (1921), and the Ninth Circuit, *Los Angeles Trust Deed & Mortgage Exchange* v. *SEC*, 285 F.2d 162 (9th Cir. 1960), *cert. denied*, 366 U.S. 919 (1961). *See Cement Antitrust*, 688 F.2d at 1302.

[2/] Again, petitioners are puzzled by respondent Mayo's assertion that "a review of applicable Ninth Circuit authorities, decided both before *and after In re Cement* undeniably establishes the general availability of mandamus to review the *denial* of a recusal motion. . . ." Mayo Opp. at 11 (emphasis added and original). In fact, Mayo only cites to three Ninth Circuit decisions, all decided well *before Cement Antitrust*. *See* Mayo Opp. at 13. In *United States* v. *State of Washington*, 573 F.2d 1121 (9th Cir. 1978), (miscited by Mayo as "537 F.2d") the court stated only that mandamus review "may" be available, but only "[i]n the exceptional case," *id.* at 1122, and refused to consider the appeal therein as a mandamus petition. The other two cases (both from the 1950's) involved mandamus petitions under 28 U.S.C. § 144 based upon exceptionally blatant expressed personal bias and prejudice of the judge against the attorney or the parties. And *United States* v. *Conforte*, 457 F.Supp. 641, 651 (1978), *aff'd on unrelated grounds*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980), (continued...)

Ninth Circuit continues to hold that harm caused by a violation of section 455(a) can be corrected on post-judgment appeal, which reinforces that court's view that mandamus relief is inappropriate. *See Preston* v. *United States*, 923 F.2d 731, 735 (9th Cir. 1991). Because respondents have refused to recognize the clear import of *Cement Antitrust*, as reflected in the decision below, they have simply ignored the conflict between the Ninth Circuit and all other circuits that have addressed this issue. *See* Mayo Opp. at 15 n.8 (expressly declining to address the law in other circuits); Gov. Opp. at 6-7.

Respondents also have ignored the utter disarray among the circuits as to the proper procedural and substantive standards to be employed on mandamus petitions from denials of section 455(a) motions. *See* Pet. 14-20. The government is simply wrong when it asserts that the standard of review on mandamus is effectively the same in the various circuits. Gov. Opp. at 7. As petitioners have shown, some circuits, such as the First and Second, apply a much more stringent substantive standard of review on mandamus than on post-judgment appeal. Pet. at 16. Other circuits, such as the Third, Fifth, Sixth, Eight, and Tenth, apply the same substantive standard of review on mandamus and on post-judgment appeal. Pet. at 17-18. Finally, the Seventh Circuit reviews denials of section 455(a) recusal motions *only* by mandamus, under the less demanding standard of review. Pet. at 18-20.

Those circuits that do not impose a heightened standard on mandamus review recognize that when the statutory standard is met, *i.e.*, when the judge's "impar-

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[2]/(...continued)
involved a district court decision, which relied solely on a Fifth Circuit case for the proposition that a refusal to recuse under 28 U.S.C. § 455 could be reviewed by mandamus.

tiality might reasonably be questioned", then the right to relief is clear and indisputable, and the petition for mandamus should be granted. Pet. at 21-24. As petitioners have explained, this approach best effectuates the purposes of section 455(a), best conforms to the proper usages of mandamus, and uses judicial resources most efficiently. Pet. at 20-24. The government's denials notwithstanding, this approach is very different than that of the First or Second Circuits, which impose the added burden that it must be clear and indisputable that the judge's impartiality might reasonably be questioned before a mandamus petition may be granted. Pet. at 21.

II. Even assuming that the Ninth Circuit purportedly engaged in some minimal review of the merits of the mandamus petition, its "clearly erroneous as a matter of law" test, *Cement Antitrust*, 688 F.2d at 1305; *Bauman* v. *United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977); Pet. App. 2a-3a, presents a virtually insurmountable barrier to meaningful mandamus review of a denial of a section 455(a) motion and undermines the purpose of section 455(a), which is to maintain public confidence in the integrity of the judiciary. *See Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 860, 865 (1988); Pet. at 24-27. As this Court stated, "If [a judge] concludes that 'his impartiality might reasonably be questioned,' then he should also find that the statute has been violated." *Id.* at 861. Nevertheless, the court below stated that even when "reasonable minds might draw different inferences from the facts," a district court order denying recusal will not be overturned unless it is "clearly erroneous" as a matter of law (Pet. App. 2a-3a). As petitioners have explained, the court's finding that "*reasonable minds might* draw different inferences" (emphasis added), effectively parallels the statutory language that recusal is mandated whenever a judge's "impartiality *might reasonably be* questioned," 28 U.S.C.

§ 455(a) (emphasis added), and if there is any relevant distinction between these two standards, it would certainly escape an objective reasonable lay person. Pet. at 24-25.

Indeed, petitioners note that the government does not even mention, let alone attempt to defend, the Ninth Circuit's idiosyncratic "clearly erroneous as a matter of law" standard. The government ignores this issue by incorrectly asserting that "the petition for writ of mandamus raises only questions of fact." Gov. Opp. at 7. In fact, the mandamus petition raised several legal issues, including that the district court improperly applied a subjective, rather than an objective, reasonable person standard; required actual bias, rather than the appearance of partiality; and demanded that evidence of partiality be from an extrajudicial source. *See* Petition for Writ of Mandamus at 40-44; Pet. at 27-30.[3/]

Respondent Mayo's extensive reliance on the five-factor *Bauman-Cement Antitrust* test,[4/] Mayo Opp.

[3/] The government incorrectly asserts that the court of appeals properly reviewed the district court's findings of *fact* for clear error. Gov. Opp. at 7-8 & n.3. The court's plain language and its citation to *Bauman* and *Cement Antitrust*, Pet. App. 3a, however, make clear that it held that the "order denying recusal," Pet. App. 2a, was not "clearly erroneous as a matter of law," not that the district court's fact findings were not clearly erroneous. Pet. at 25-27.

[4/] The factors are: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests persistent disregard for the federal rules; and (5) whether the district court's order raises new and important problems or issues of law of first impression. *Cement Antitrust*, 688 F.2d at 1301; *Bauman*, 577 F.2d at 654-55.

at 9-10, 15-21, only emphasizes the unique obstacles to mandamus review imposed by the Ninth Circuit. The party petitioning from denial of its recusal motion will always fail the first two factors, because the Ninth Circuit holds that the party may remedy any harm by post-judgment appeal. *See Cement Antitrust*, 688 F.2d at 1302; *Preston*, 923 F.2d at 735; Pet. App. 3a; *Branson* v. *City of Los Angeles*, 912 F.2d 334, 336 (9th Cir. 1990) (first factor not met when post-judgment appeal is available). Moreover, the petitioner in a section 455(a) case will almost always fail the fourth factor, because the denial of a recusal motion by a particular judge in a particular case will almost never involve repeated error or persistent disregard for the federal rules. Finally, the fifth factor will rarely be met because, although the factual variations are infinite, the legal principles for recusal under section 455(a) are well-settled (although they were ignored by the district court in this case, Pet. 27-30; Pet. App. 5a-17a).

Thus, the *only* factor a mandamus petitioner might meet in seeking review of a denial of a section 455(a) motion is the "clearly erroneous as a matter of law" factor. Yet if this factor were alone sufficient, it would be a "one-factor" test. Moreover, this standard itself undermines the very purpose of section 455(a). *See* Pet. 24-27. Finally, petitioners note that the Ninth Circuit abandons the *Bauman-Cement Antitrust* factors, including the "clearly erroneous" standard, in areas of the law in which the court believes that mandamus review is generally appropriate. *See Wilmington Trust* v. *United States Dist. Court*, 934 F.2d 1026, 1028 (9th Cir. 1991) (right to jury trial), *cert. denied*, 112 S.Ct. 1578 (1992); *Mondor* v. *United States Dist. Court*, 910 F.2d 585, 586-87 (9th Cir. 1990) (same). Thus, the court of appeals' decision to impose the *Bauman-Cement Antitrust* factors to deny review of the mandamus petition in this case must be seen as a decision,

contrary to that of every other circuit, that substantive mandamus review of a denial of a section 455(a) recusal motion is generally inappropriate.

III. Application of the correct legal standards mandates granting of the petition for writ of mandamus and recusal of Judge Ideman in the four cases at issue herein. Pet. at 27-30. No deference is due the district court's order because it engaged in a subjective inquiry into Judge Ideman's state of mind, rather than an objective inquiry into how a reasonable lay person would have viewed the known facts, as required by section 455(a). *See* Gov. Opp. at 6; Pet. at 27. The government's attempt to remake the district court's findings as to Judge Ideman's subjective bias into an objective "reasonable person" inquiry, Gov. Opp. at 8 n.2, is creative, but must ultimately fail in the face of the court's clear holding: "We are left with the issue, is the objective reason that you've asserted for believing that he has some bias sufficient to support a conclusion that he does. . . . the law is clear, *the bias* must stem from an extrajudicial source . . . . That is the issue to be decided." Pet. App. 12a. That, however, is *not* the issue to be decided. Rather, the issue is whether a reasonable lay observer might question the judge's impartiality. *See* 28 U.S.C. § 455(a). Thus, whether the district court's "factual findings" as to Judge Ideman's subjective state of mind are clearly erroneous, Gov. Opp. at 8 n.3, is irrelevant.[5/] Indeed, respondents Mayo and Aznaran more forthrightly

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[5/] The government's assertion that findings of fact should not be reviewed *de novo*, Gov. Opp. at 8 n.3, is likewise irrelevant to this matter, in which the district court applied the wrong *legal* standard. The Ninth Circuit has recently stated (somewhat inconsistently with the standard it applied in this case and in *Cement Antitrust*) that when the issue is one of law, "We determine *de novo* whether the writ [of mandamus] should issue." *Valenzuela-Gonzalez* v. *United States Dist. Court*, 915 F.2d 1276, 1279 (9th Cir. 1990).

recognize that the district court focused on actual subjective bias, although they are wrong in contending that that was the proper inquiry in this case. *See* Mayo Opp. at 22-24; Brief in Opposition of Vicki J. Aznaran, *et al.*, at 16-24 ("Aznaran Opp.").

Because the district court made irrelevant findings of fact and applied incorrect legal standards, its decision is entitled to no deference, and certainly the convoluted, "elusive at best" "clearly erroneous as a matter of law" standard of *Cement Antitrust*, 688 F.2d at 1305, has no place in this case. Petitioners submit that proper application of section 455(a) to the facts of this case, particularly the presence of the framed, mounted copy of the *Time* magazine cover in Judge Ideman's chambers, would lead a reasonable observer to question Judge Ideman's impartiality, Pet. at 3-11, 27-30, and therefore the petition for writ of mandamus should have been granted.

IV. The Aznaran Opposition is devoted primarily to a lengthy recitation of excuses (generally belied by the evidence) as to why the Aznarans have repeatedly failed to obey Judge Ideman's orders, and to scurrilous invective directed against petitioners and the Scientology religion that is irrelevant to the issues presented herein. Aznaran Opp. at 3-15.[6/] The only relevant fact set forth in the Opposition is the district court's finding that it is "largely undisputed" that "the blatant disregard of [Judge Ideman's] order was not

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[6/] Much of the rest of the Aznaran Opposition focuses erroneously, as did the district court itself, on the standards for actual judicial bias and prejudice, including lengthy excerpts from the district court's decision, rather than on the objective appearance of impropriety standard of section 455(a). Aznaran Opp. at 16-24.

attributable to" the Church. Pet. App. 13a; Aznaran Opp. at 23; Pet. at 11-12, 30.[7/]

CONCLUSION

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Dated: New York, New York
May 14, 1992

Respectfully submitted,

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7/ Petitioners further note that the Aznaran Opposition was untimely served and filed on May 5, 1992, despite this Court's order that all briefs in opposition be filed no later than May 4, 1992 (the Court's order provided for filing by May 3, 1992, which was a Sunday). The Aznarans made no application to this Court for a further extension or for permission for late filing. Therefore, the Aznarans' brief should not be accepted for filing or considered by the Court. Petitioners further note that the late filing provides yet another example of the Aznarans' "blatant disregard" of court orders, as found by the district court. Pet. App. 13a.